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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VICTOR D'ARC,

Petitioner,

vs.

MARY LEA J. D'ARC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a trial court's application of the "preferred suitor" doctrine, which doctrine mandates the adoption of a special standard favoring the wife instead of treating each party equally when considering the enforceability of an interspousal separation agreement entered into between the parties freely, voluntarily and understandingly deny the husband his right to equal protection of law as guaranteed by the 14th Amendment to the United States Constitution? Does the trial court's action in refusing to enforce such an agreement which is not unfair or unconscionable on its face violate article 1, §10 of the United States Constitution which prohibits the adoption of any law impairing the obligation of a contract.

2. In a matrimonial proceeding does the action of a trial judge in divesting one party of all his right, title and interest in any and all property acquired by him prior to the marriage as well as all property acquired by both parties or either of them during the marriage based on an allegation of marital misconduct unrelated to the acquisition of said assets or the manner in which title was held constitute a taking of property without due process of law as prohibited by the 14th Amendment to the United States Constitution?

3. In a civil proceeding does the allowance into evidence of a purported tape recording of an alleged telephone conversation where there is absolutely no direct testimony or other proper foundation established concerning the circumstances surrounding the making of the tape, the control of the tape and the delivery of the tape to the party who sought its introduction violate the provisions of 18 *U.S.C.A.* §2510-2520?

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

VICTOR D'ARC,

Petitioner,

vs.

MARY LEA J. D'ARC,

Respondent.

On Petition for Writ of Certiorari

OPINIONS BELOW

The opinions below are as follows:

D'Arc v. D'Arc, 157 N.J. Super. 553 (Ch. 1978).

Letter Opinion of the Superior Court of New Jersey, Chancery Division by the Honorable Michael R. Imbriani dated March 14, 1978, which is set forth in the accompanying appendix (Pa3a).

Letter Opinion of the Superior Court of New Jersey, Chancery Division by the Honorable Michael R. Imbriani dated November 20, 1978, which is set forth in the accompanying appendix (Pa16a).

D'Arc v. D'Arc, 164 N.J. Super. 226 (Ch. 1978).

D'Arc v. D'Arc, 175 N.J. Super. 598 (App. Div. 1980) (Pa34a).

Order denying plaintiff's application for certification to the New Jersey Supreme Court dated December 9, 1980, which is set forth in the accompanying appendix (Pa43a).

JURISDICTION

Certiorari to this court is sought pursuant to 28 *U.S.C.A.* §1257(3) (Pa28b).

STATUTES

The statutes involved in this case are set forth below as follows:

N.J.S.A. 2A:34-23

2A:34-23. Alimony; maintenance; custody and maintenance of children; failure to obey order; sequestration; receiver; modification of orders

> Pending any matrimonial action brought in this State or elsewhere, or after judgment of divorce or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circumstances may require.
>
> In all actions brought for divorce, divorce from bed and board, or nullity the court may award alimony to

either party, and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just. In all actions for divorce or divorce from bed and board where judgment is granted on the ground of institutionalization for mental illness the court may consider the possible burden upon the taxpayers of the State as well as the ability of the plaintiff to pay in determining an amount of maintenance to be awarded.

In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage.
Amended by L.1971, c.212, §8.

All other statutes, constitutional provisions and Rules are set forth verbatim in the accompanying appendix. The following is a list thereof:

14th Amendment to the United States Constitution (Pa3b).

U.S.C.A. Const. Art. 1 §10 (Pa27b).

N.J.S.A. Constitution Art. 4, §7, ¶3 (Pa4b).

18 *U.S.C.A.* §2510-2520 (Pa4b).

28 *U.S.C.A.* §1257 (Pa28b).

N.J.S.A. 2A:156A-1 through 26 (Pa28b).

New Jersey Evidence Rule 8 (Pa48b).

GROUNDS FOR JURISDICTION

(a) The agreement

Certiorari is sought to review the decision of the Superior Court of New Jersey, Chancery Division dated November 20, 1978, 164 N.J. Super. 226 (ch. 1978), the decision of the Superior Court of New Jersey, Appellate Division dated October 10, 1980 175 N.J. Super. 598 (App. Div. 1980) and the December 9, 1980 order of the New Jersey Supreme Court denying plaintiff's application for certification thereto.

In particular it is submitted that the question as to whether a State Court has the right to apply the "preferred suitor" doctrine which specifically favors the wife as the preferred spouse when viewing the enforceability of an interspousal agreement is a question of far reaching public importance which should be considered by this court. Interspousal separation and property settlement agreements as well as premarital agreements are entered into by millions of people each year who rely on their enforceability. The significance of this question is underscored by contemporary notions of equality between sexes, expanding woman's rights and the proposed "Equal Rights Amendment." Moreover the mobility of our society wherein people move from one State to another further emphasizes the need for this court to consider this now timely and novel issue.

It is submitted that the court's adoption of a "preferred suitor" doctrine which, in fact, favors the wife as opposed to treating each party equally, is a denial of a husband's constitutionally guaranteed right of equal protection, and an improper exercise in sex discrimination. Furthermore it is an adoption of a standard which is in conflict with the now public policy of treating husbands and wives equally under the law in matrimonial cases, as well as the principles of equality established by this court in *Orr v. Orr*, 440 U.S. 268 (1979).

Finally it is submitted that the refusal of the trial court to enforce the agreement between the parties after adopting this doctrine constitutes an unconstitutional impairment of the parties' contractual obligations.

The issue as to the enforceability of the February 22, 1976 agreement between the parties was raised in the second cause of action in plaintiff's initial complaint wherein judgment was sought.

> "(A) Specifically enforcing the agreement entered into between the parties dated February 22, 1976."

The trial judge (line 17, page 11 of the letter opinion dated November 20, 1978) set forth his findings with respect to the February 22, 1976 agreement, recited the adoption of the "preferred suitor" doctrine and proceeded to deny plaintiff-husband's application for enforcement of the agreement. Thereafter in Point II of plaintiff's main brief on appeal it was argued that adoption of the "preferred suitor" doctrine was inappropriate and its application by the trial judge constituted ". . . a violation of the equal protection clause (fourteenth amendment) of the U.S. Constitution as well as the laws of New Jersey (16 Am. Jur. 2nd 514). In that same point it was further argued that:

> "The Federal Constitution and the State Constitution prohibit the adoption of any law impairing the obligation of a contract. U.S. Constitution, Article 1 Section 10: *Daniel v. Borough of Oakland*, 24 N.J. Super. 69 (App. Div. 1973)."

The Appellate Division inferentially affirmed the trial court by ignoring this issue and the New Jersey Supreme Court denied certification.

(b) Equitable distribution and related financial matters including alimony.

In the first cause of action of plaintiff's complaint for divorce filed September 30, 1976 judgment (in part) was sought:

* * *

> "(B) Compelling the defendant to pay adequate alimony for the plaintiff;
>
> (C) Providing for an equitable distribution of assets of the parties legally and beneficially acquired during the course of the marriage."

* * *

In the trial memorandum (plaintiff's summation, Points I and II) it was argued that the issue of the alleged marital misconduct, *i.e.* the alleged telephone conversation which took place after the parties separation was not a relevant or proper factor to be considered by the trial judge *vis a vis* the issues of support and property distribution. Reliance was upon *N.J.S.A.* 2A:34-23 and the New Jersey Supreme Court's rulings in the cases of *Painter v. Painter*, 65 N.J. 196 (1974); *Rothman v. Rothman*, 65 N.J. 290 (1974); *Scalingi v. Scalingi*, 65 N.J. 180 (1974) and *Chalmers v. Chalmers*, 65 N.J. 186 (1974). After hearing "certain testimony" *(infra)* on this issue, the trial judge in this letter opinion stated that:

> "Candidly, the court believes that Dr. D'Arc (plaintiff) is entitled to nothing, . . ."

The trial judge "permitted" plaintiff to retain the proceeds from the sale of the apartment which he owned prior to the marriage as well as certain other assets. Each party appealed and plaintiff argued in Point IV of the main brief that the court's determination was in fact a deprivation of property without due process of law and violative of the decisions of the State's highest court. The Appellate Division, affirmed the trial court in part, agreeing with the trial judge that plaintiff was entitled to nothing and further directed plaintiff to pay the proceeds from the sale of his apartment as well as other assets to defendant. The Appellate Division did not set forth the authority for directing plaintiff to convey the proceeds from the sale of this property (his apartment) owned by him prior to the marriage nor was there authority for the Appellate Division's affirmance of the order which required plaintiff to forfeit his interest *in any and all property* acquired by the parties during the marriage. The Appellate Division did not comment on the fact that the decisions of the New Jersey Supreme Court make it clear that fault is not a factor to be properly considered insofar as property distribution is concerned.

The New Jersey Supreme Court denied plaintiff's application for certification. As a result this case stands alone as being in conflict with the decisions of New Jersey's highest court and plaintiff's due process argument has been ignored.

(c) The tape.

The issue as to the admissibility of the purported tape recording was raised in plaintiff's trial summation (page 19), and was the subject of an interlocutory appeal along with the issue of the admissibility of spectrographic results *D'Arc v. D'Arc*, 157 N.J. Super. 553 (Ch. 1978). Therein it was argued that admissibility of the purported tape recording was prohibited by 18 *U.S.C.A.*, §2510 *et seq.* and *N.J.S.A.* 2A:156A-1 *et seq.* It was also argued that plaintiff had been denied his constitutional right to cross examine the individuals who allegedly made the tape, had control of the tape and delivered the tape to defendant (page 27 and 28). Notwithstanding these arguments the trial judge admitted the purported tape recording into evidence over the objection of plaintiff relying on New Jersey Evidence Rule 8(1).

It was again argued in Point I of plaintiff's main brief on appeal that the purported tape of the alleged telephone conversation should not have been admitted into evidence. Reliance is on 18 *U.S.C.A.* §2511 and §2515 (and *N.J.S.A.*, 2A:156A-1 through 4 to the same effect). It was again argued that plaintiff had been denied his constitutionally protected right to cross examine the individuals who allegedly made the tape, controlled it and delivered it to defendant.

The Appellate Division (page 4 of the letter opinion dated October 10, 1980) ruled that plaintiff's argument and reliance on 18 *U.S.C.A.*, §2511 was "without merit." The Appellate Division decision went on to state:

> "The testimony of defendant at trial showed that one of the parties to the conversation, Theodore Fino, told her he made the tape. Though defendant's testimony was hearsay it nevertheless could be considered in the preliminary proceeding under evidence Rule 8 to determine admissibility of the tape, particularly since defendant could rightly regard Fino as not available. *State v. Moore*, 158 N.J. Super. 6880-84 (App. Div. 1978). In any event there is no showing of illegal wiretapping, only speculation by plaintiff."

That is the sum and substance of the Appellate Division consideration of this issue.

This argument was advanced in Point II of plaintiff's application for certification to the New Jersey Supreme Court which application was denied.

STATEMENT OF THE CASE

This is a matrimonial action wherein the parties were married on July 15, 1972, after having lived together for approximately one year. Both parties were in their early fiftys at the time of the marriage and it was the second marriage for each. The parties separated on or about February 22, 1976 at which time they entered into a written separation agreement. They complied with the provisions of that agreement for several months thereafter with payments being made and accepted pursuant thereto. Defendant in approximately April, 1976, ceased making the payments that she was obligated to make under the agreement. On September 30, 1976 plaintiff filed a complaint for divorce which, in the second cause of action sought enforcement of the separation agreement between the parties. During the course of the trial it was established that the agreement was entered into freely and voluntarily by both parties. The trial judge, however, denied plaintiff's application to enforce the agreement. In so doing the trial judge applied the so called "preferred suitor" doctrine which doctrine specifically requires the adoption of a standard that affirmatively favors the wife rather than to treat each spouse equally.

The trial judge was thereupon required to effect an "equitable distribution" of property acquired by the parties during the marriage under the relatively new (effective September 1, 1971) equitable distribution statute in New Jersey, *N.J.S.A.* 2A:34-23. The assets acquired by the parties during the marriage were extensive and consisted of real property owned for the most part as tenants by the entirety as well as bank stock, art objects and other assets. The assets were worth several million dollars. The trial judge, presumably pursuant to the authority vested in him by that statute, ruled that plaintiff was to convey all his right, title and interest in any and all of these assets to defendant. Plaintiff was "permitted" to retain the proceeds from the sale of an apartment in New York City (in the approximate amount of $150,000.00) which apartment was owned solely by plaintiff having been acquired by him prior to the marriage.

Plaintiff appealed and defendant cross-appealed whereupon the Appellate Division not only affirmed the trial court's order but further ruled that plaintiff was to turn over to defendant the proceeds from the sale of his N.Y. apartment and other assets. Plaintiff's request for alimony was also denied. Plaintiff literally was required to forfeit any and all assets acquired by him both prior to and subsequent to the marriage having been directed to turn over all said assets to defendant. This ruling was essentially based on an alleged act of marital misconduct instead of being related to the method (time, contribution or manner in which title was held) by which the assets were acquired.

The pivotal fact in this case which led to the extraordinary result was each party's allegation that the other party spoke to a third person about the possibility of having the other killed. Defendant attempted to prove her claim by the introduction into evidence of what purported to be a tape recording of an alleged telephone conversation between plaintiff and a third person. This tape recording was allowed into evidence without the existence of any direct testimony or evidence concerning the circumstances surrounding the making of the tape, the control of the tape or the delivery of the tape to defendant. In short, there was no direct testimony to establish a proper foundation necessary for the admission of the tape into evidence.

REASONS FOR THE ALLOWANCE OF THE WRIT

Point I

The trial court was in error in applying the "preferred suitor" doctrine when considering the enforceability of an interspousal separation agreement entered into freely and voluntarily by both parties and fair on its face. The error constitutes a denial of the right to equal protection as provided by the 14th Amendment of the United States Constitution and further constitutes an impairment of contractual obligations as prohibited by article 1 §10 of the United States Constitution.

In the within case the parties at the time of their separation on February 22, 1976 entered into a separation agreement. The agreement was formalized in writing and submitted into evidence during the hearing as exhibit D-1 (Pa61a). The parties testified that the provisions of the agreement had been negotiated at some length between them and that they discussed and agreed to each and every provision of the agreement before it was prepared. Only then was the agreement actually formalized in writing at which time it was executed by both parties. The proofs adduced at trial established that plaintiff did not apply any pressure on defendant to sign the agreement nor did he threaten her in any manner. Defendant had sufficient time to read the agreement, she admittingly understood it and for several months the parties performed in accordance with its provisions.

The trial court, however, ruled that the agreement was not enforceable. In so ruling the trial judge cited several cases to support his application of the "preferred suitor" doctrine which requires the trial court to adopt a position specifically favoring the wife in such cases. It is respectfully submitted that this is in error for several reasons: (1) the application of this doctrine in any case is an unconstitutional denial of equal protection to the husband; (2) is an unconstitutional impairment of contractual obligations; (3) is unjustifiable sex discrimination; and (4) the facts of this case do not warrant the application of the doctrine.

Defendant-wife had candidly admitted that she signed the agreement freely and voluntarily after reading it and the trial judge found absolutely no evidence of fraud, coersion, undue influence or improper conduct by plaintiff with respect to the agreement. It was established that the parties entered into the agreement freely and voluntarily. Each party had been previously divorced and each was experienced with respect to business ventures and contracts with defendant having entered into many substantial business ventures and transactions with and without the benefit of attorneys. Thus, it is submitted that the trial judge was in error in applying the preferred suitor status in favor of the wife rather than in applying a standard of equality.

The established law of the State of New Jersey is that contracts between husband and wife are enforceable in equity so long as they are fair and equitable. The application of the preferred suitor doctrine which favors the wife in such matters is a denial of equal protection and contrary to the public policy clearly expressed by the New Jersey Supreme Court in *Lepis v. Lepis*, 83 N.J. 139 (1980), *Brandenburg v. Brandenburg*, 83 N.J. 198 (1980), *Carlsen v. Carlsen*, 72 N.J. 363 (1977), and by this court in *Orr, supra.*

The guarantee of equal protection as provided by the fourteenth amendment of the United States Constitution (and *N.J.S.A.* 2A:34-23) mandates that husbands and wives are to be treated equally in matrimonial actions including proceedings involving the enforcement of interspousal agreements.

The agreement in question itself provides as follows:

> "Mary Lea (defendant-wife) acknowledges this to be a fair and just arrangement in recognition of the fact that Victor (plaintiff-husband) gave up his professional career and earnings to be able to devote himself to her business interests and that he contributed all of his energies to their marriage and family affairs.
>
> "If Victor and Mary Lea should become divorced they agree that this agreement shall be part of the divorce decree.
>
> "Victor agrees that if in his lifetime he should acquire sufficient capital in his personal estate to produce the same amount of income, Mary Lea will be released from all financial obligations to him."

At the time that the agreement was entered into by the parties each of them was fully aware of the other's income, assets and needs. Defendant has an income of $1,200,000.00 per year *plus* (in 1975 she had additional income of approximately $2,600,000.00) one-half of which is tax free, and she can well afford to make the payments required by the agreement.

Thus, it is submitted that the agreement between the parties in the present case is binding and enforceable.

The Federal and the New Jersey State Constitution prohibit the adoption of any law impairing the obligation of a contract. *U.S.C.A.* Const., Art. 1, §10; *N.J.S.A.* Const. Art. 4, §7, ¶3; *Daniel v. Borough of Oakland,* 124 N.J. Super 69 (App. Div. 1973) and *Krosnowski v. Krosnowski,* 22 N.J. 376 (1956). These cases support the fundamental law of contracts that the legal rights and obligations arising therefrom shall be enforced as written. When parties enter into such an agreement (even if they are husband and wife) they are bound thereby.

The trial judge's application of the preferred suitor doctrine denied plaintiff his constitutionally guaranteed right of equal protection and was in effect sex discrimination without justification. The New Jersey Appellate Division and New Jersey Supreme Court opinion failed to consider this issue at all although it had been raised on appeal.

It is respectfully submitted that certiorari should be granted to review the very important constitutional questions presented by this issue. Simply stated, husbands and wives should be treated equally when a court is called upon to consider the enforceability of inter-spousal agreements. Any other approach (as here the special treatment of the wife as the preferred suitor) is violative of the constitution safeguards guaranteeing equal protection of law regardless of sex and an unconstitutional impairment of contractual obligations.

Point II

It was a taking of property without due process of law to divest of all his right, title and interest in any and all assets acquired by the parties or either of them during the marriage. It likewise was in error to divest plaintiff of the proceeds from the sale of an apartment which he owned individually prior to the marriage between the parties.

On this issue there are additional reasons for the granting of certiorari in the within case. The constitutionality of the New Jersey equitable distribution statute has never been determined by this court. An increasing number of states have adopted or are adopting "equitable distribution" statutes similar to New Jersey (e.g. Colorado and New York). In the within case the court has construed the authority bestowed upon it by the statute to give it the right to rule that plaintiff must convey all his right, title and interest in all assets acquired by the parties or either of them during the marriage including real property, stocks and art objects worth several million dollars to defendant. The result obtained herein is unconstitutional insofar as it gives a trial court for all practical purposes absolute unlimited authority to require one party to forfeit and convey to the other any and all assets in which that party has an interest, regardless of whether acquired prior to or during the marriage, without consideration of the contribution of that party towards the acquisition of assets and without considering the right of a party to have his or her fair share of assets acquired during the marriage. The court's determination of the issue will have far-reaching effect as more states adopt property distribution statutes and the number of divorces continues to increase. The scope of the court's authority pursuant to such statutes is a question of genuine public importance which has not but should be resolved by this court.

The rulings of the New Jersey courts conflict with the provisions of the statute which grant the authority as well as the case law concerning marital fault and its relationship to equitable distribution, alimony, and related matters.

Once the trial judge determined that enforceability of the separation agreement between the parties was to be denied, resolution of the financial aspects of the divorce remained for consideration. These included the issues of equitable distribution, alimony and counsel fees.

Defendant after having moved to have judgment for divorce entered on "no fault" grounds (a fact accomplished) was permitted to introduce evidence of alleged marital misconduct on the part of the plaintiff. It is submitted that it was improper to take this testimony. It inevitably precipitated the strong possibility that the trial judge would be prejudiced thereby creating the constitutional problems raised herein. In fact, there would be no other result.

The alimony and equitable distribution of *N.J.S.A.* 2A:34-23 provide as follows:

> "In all actions brought for divorce, divorce from bed and board, or nullity the court may award alimony to either party, and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. *In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just.*"

• • •

> "In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage." (Emphasis added).

Only in cases where the judgment for divorce is based on "fault" grounds may marital fault be a factor perhaps relevant to the proper amount of alimony to be awarded. It is clear from the emphasized language of the statute that marital fault or wrongdoing is *not* a factor to be considered in cases where the judgment of divorce is granted on the ground of eighteen months separation, which is exactly the situation in the case sub judice.

In *Greenberg v. Greenberg*, 126 N.J. Super. 96 (App. Div. 1973) the Appellate Division reversed the trial court's award of alimony to the wife, ruling that marital wrongs do not constitute a basis for awarding alimony or for punishing a marital wrongdoer (in that case, the husband). The court restated the long standing test for determining the proper amount of alimony (See *Turi v. Turi*, 34 N.J. Super. 313 (App. Div. 1952); and *DiTolvo v. DiTolvo*, 131 N.J. Super. 72 (App. Div. 1974) including the elements of needs, ability to pay, duration of the marriage, physical, social and economic position of the parties; however, the court excluded fault as a factor.

The express language of the governing statute (*N.J.S.A.* 2A:34-23) provides that the court may consider marital fault as a factor in determining the proper amount of alimony to be awarded only in actions ". . . other than those where judgment is granted solely on the ground of separation . . ." In the case *sub judice*, the parties elected to prove a cause of action for divorce on the ground of separation (the defendant-wife, in fact, moved for summary judgment on this issue) and judgment was entered solely on this ground. Therefore; fault was not a proper factor relevant to the court's consideration of the alimony issue.

Never is fault a proper factor for consideration by the trial court when making an award for equitable distribution.

The concept of marital fault as it relates to dissolution of the marriage and its effect on equitable distribution was considered by N.J.'s highest court. In *Chalmers supra,* The New Jersey Supreme Court made the following ruling in that regard.

> "Should matrimonial fault be one of the criteria or circumstances that may properly be taken into account (in the equitable distribution of assets)? We conclude that the answer must be in the negative even though the statute speaks of "equitable distribution". Indeed, we are satisfied that the concept of "equitable distribution" required that fault be excluded as a consideration." *Id.* at page 193".

The decision of the trial court and of the Appellate Division in the within case is contrary to the New Jersey Supreme Court's rulings in *Painter, supra* and *Rothman, supra* which set forth the criteria that the court is to consider when making an award for equitable distribution, as well as the quoted ruling of *Chalmers, supra.*

Furthermore, since the conversation allegedly was learned of in April, 1976, subsequent to the date that the parties entered into their separation agreement at the time of their separation in February, 1976, this conduct is irrelevant on that issue according to the New Jersey Supreme Court's decision in *Brandenburg, supra* and *Smith v. Smith*, 72 N.J. 350 (1977).

The issue of marital fault, however, was not only considered by the court but was determined to be the single factor overriding all others notwithstanding the aforementioned statute and case law in this regard. It led to the extraordinary result from which plaintiff appealed.

Plaintiff has been directed to forfeit (and defendant has been rewarded with) all his interest in property worth several million dollars which property for the most part was jointly acquired by the parties during the marriage. Even more extraordinary however is the decision of the New Jersey Appellate Court which not only affirmed the trial court's ruling but went further to direct plaintiff to convey to defendant the proceeds from the sale of property which was solely owned by plaintiff having been acquired by him prior to the marriage.

It is respectfully submitted that the court's order taking *all* plaintiff's property from him and awarding it to defendant as a result of an alleged act of marital misconduct constitutes an unconstitutional taking of property without due process of law. Moreover if the statute is to be construed so as to give the courts this unlimited power then the constitutionality of the statute as a whole should be examined by this court with regards to the constitutional guarantee of due process of law and the vagueness of the statute itself which sets forth absolutely no guidelines for the court to follow when effecting this "equitable distribution" of property. This is a question of increasing significance as more and more states adopt property distribution statutes similar to New Jersey's and the number of divorces increase. Does the adoption of such a statute actually bestow upon a trial judge the unlimited authority to divest one party of any and all property acquired by him either along or with his spouse; whether prior to or during the marriage, solely as a result of an alleged single act of marital misconduct?

Point III

It was an error and violative of 18 *U.S.C.A.* §2510 *et seq.* to permit the introduction into evidence of the purported tape of an alleged telephone conversation between plaintiff and a third party where no foundation had been established by competent direct evidence.

As stated, the determination of the within case actually turned on the question of the admissibility of the purported tape (or copy thereof) of the alleged telephone conversation(s) between plaintiff and a third person. Plaintiff denied ever engaging in the conversation. The third party who purportedly made the tape did not testify or provide any affidavits. His deposition was not taken although defendant's attorney had the right to do so. The individual who supposedy made the tape did not deliver it to the defendant rather it was allegedly delivered by another third person who also failed to come forward to testify as to how he had obtained the tape, what he had done with it, whether it had been altered at all or how he came to provide it to defendant. The tape was admitted based on defendant's hearsay statement that these third persons had told her about the tape and had given it to her although no explanation was offered as to why they never came forward to corroborate this claim.

18 *U.S.C.A.* §2511 provides that wiretap interception of telephone communications, the recording of telephone conversations, etc., are unlawful acts subject to penalties. Section 2515 of the same statute provides that no part of communication intercepted in violation of this chapter may

be received into evidence in any trial, hearing or other proceeding before any court or other tribunal of the United States, a State of political subdivision thereof. *N.J.S.A.* 2A:156 provides for the New Jersey adoption of similar standard. *In Progress Trace of a Wire Communication*, 138 N.J. Super. 404 (App. Div. 1975). Even though defendant provided no evidence surrounding the making of the purported tape, control of the tape, etc., the trial judge admitted the tape into evidence, notwithstanding the fact that there was no proper foundation laid with respect to the tape. *State v. Driver*, 36 N.J. 225 (1962); *Anno.* 58, A.L.R. 2d 1024 (1958); *State v. Driver, supra,* the New Jersey Supreme Court stated the conditions for admissibility of such a recording as follows:

> "As a condition to admissibility, however, the speakers should be identified and it should be shown that (1) the device was capable of taping the conversation or statement; (2) its operator was competent; (3) the recording is authentic and correct; (4) no changes, additions or deletions have been made. . . ."

Defendant's proofs are totally lacking in this regard; they do not even begin to establish the conditions for admissibility. (The trial judge "presumed" that these conditions were met only because of the existence of "a tape"). Defendant provided no evidence as to any of the circumstances surrounding the taking of the purported tape or the qualifications of the person who allegedly made the tape; nor is there any way to establish the authenticity of the tape in its present form. None of the principals allegedly involved in the making of the tape, of the copy of the tape, who claimed to have had custody and control of it or made delivery of the tapes to defendant have come before the court in any way. Defendant, however, relied upon the claim that *they* initiated contact with defendant and volunteered the tape to her, although no explanation is offered for their failure to come forward with sworn testimony during the twelve days of trial which were spread over a period of approximately five months.

The admissibility of the tape violates the statutory and case law requirements regarding such recordings. It's admissibility was based on the self-serving hearsay statements of defendant. Plaintiff has been denied his constitutionally protected right to cross-examine the individuals (Theodore Fino) who allegedly made and/or had control of the tape and who delivered it to defendant.

Even if we assume arguendo that the conversation did take place, the copy of the purported tape would still not be admissible given the failure to meet the statutory requirements. *State v. Droutman*, 143 N.J. Super. 333 (Law 1976). The intrusion into private communication by means of a wiretap or tape recording is clearly illegal and not admissible into evidence where the express guidelines of the statute have not been met. *State v. Droutman, supra*, ruled:

> "The wiretap statute renders unlawful the interception of communications which are not in accord with procedures outlined in its provisions, *N.J.S.A.* 2A:156A-21. *N.J.S.A.* 2A:156-2(c) defines the term "intercept" as the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device. "Contents" include "any information concerning the identity of the parties to such a communication or the existence, substance or meaning of that communication." *N.J.S.A.* 2A:156-2(g). A reading of the cited provisions clearly indicates that the statute applies to the use of any device or apparatus capable of detecting, among

> other things, the identity of a party to a communication as a result of overhearing words or sounds."

The importance of specific compliance with the provisions of the wiretap statute was underscored in *In Progress Trace of a Wire Communication, Etc., supra,* where the court noted with respect to *N.J.S.A.* 2A:156-1:

> "The wiretap acts serve two basic purposes. First, they provide for the showing of probable cause, etc., necessary for compliance with the Fourth Amendment. *Above and beyond that; the acts place restrictions upon the use of wiretaps and the invasions of privacy that they entail.* Therefore, if the State, for good reason, wishes to follow the procedures and accept the limitations of the wiretap act, even though it might be able to satisfy the Fourth Amendment, otherwise, we see no reason why it should not be permitted to do so. Indeed, that procedure may be desirable." (Emphasis added).

There has been no showing why any restrictions of the act do not apply in the instant case. There has been no compliance with the provisions of the statute or case law respecting the circumstances under which the tape recording could be admitted. In fact, the admission in evidence of the purported tape recording was a violation of the very rights which the act is designed to safeguard. The seriousness of this error is magnified by the fact that it resulted in an order by which plaintiff was denied his right to "equitable distribution" of several million dollars worth of assets.

The evidence which was adduced at trial supports the conclusion that there is not sufficient justification for the result. The parties in this case agreed to submit to a polygraph examination in connection with the purported tape. The court suggested an independent polygraph examiner (Earl Kane) to conduct the examination. The examiner, however, was unable to reach a conclusion with respect to plaintiff's denial that he ever attempted to hire anyone to assassinate his wife and his denial that it was his voice on the tape. Plaintiff, however, produced another polygraph expert (Nate Laurendi) whose qualifications as such were not questioned. Mr. Laurendi testified in no uncertain terms that he was satisfied that plaintiff was truthful when he said it was *not* his voice on the tape and that he had *never* attempted to hire an assassin to murder his wife. There was no reason to question Mr. Laurendi's testimony and the trial judge did not specifically reject his testimony or conclusion.

Nowhere on the record can any attempt be made to establish the foundation necessary to introduce the tape into evidence. Absent any such showing it is submitted that the trial judge's allowance into evidence of the tape was violative of both the United States and New Jersey State Statutes in this regard. Admission into evidence of this tape led both the trial judge and the Appellate Division to decide that the plaintiff was "entitled to nothing" and as a result he has been ordered to deliver to defendant assets which were owned by plaintiff prior to the marriage herein. In addition, plaintiff was denied equitable distribution of assets worth several million dollars. Research has disclosed no cases which support such an extraordinary one-sided result. None of the factors enunciated by the Supreme Court in *Painter, supra, Rothman, supra,* and *Chalmers, supra* (1974) support such a conclusion. Nowhere can any justification be found for the award to one party of assets owned by another party prior to the marriage. In fact, such a concept has been repeatedly, specifically rejected by the Supreme Court of N.J., *Painter, supra.*

CONCLUSION

For all the reasons stated herein it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

/s/ Neil Braun
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Attorney for Petitioner

80-1526

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No.

IN THE

Supreme Court of the United States

October Term, 1980

VICTOR D'ARC,

Petitioner,

vs.

MARY LEA J. D'ARC,

Respondent.

On Petition for Writ of Certiorari

APPENDIX TO PETITION

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APPENDIX A

Opinions and Pleadings Filed with the Superior and Supreme Courts of the State of New Jersey

SUPERIOR COURT OF NEW JERSEY

Chancery Division—Somerset County

Docket No. M-2404-76

VICTOR D'ARC,

Plaintiff,

v.

MARY LEA J. D'ARC,

Defendant.

Decided: March 14, 1978

Rudd & Ackerman Esqs. by Monroe
Ackerman, Esq. appearing for
Plaintiff

Wharton, Stewart & Davis Esqs.
by Richard H. Thiele, Jr., Esq.
appearing for Defendant

OPINION OF JUDGE IMBRIANI DECIDED MARCH 14, 1978

IMBRIANI, J.C.C.

In a matrimonial action a wife obtained a recording of several telephone conversations allegedly involving her husband. Pursuant to court order a voice exemplar was made by the husband. A sound spectrogram, commonly known as a voiceprint, was made and she now seeks to introduce into evidence the recording and the results of the voiceprint test.

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A sound spectrograph is an instrument which produces a spectrogram that can be utilized by a trained examiner to purportedly identify the speaker of an unknown voice. The system was devised in the early 1940's by researchers at Bell Telephone Laboratories, Inc. and operates by an electrical process which produces on a sheet of paper a pictorial representation or graphic display of sounds, which is called a sound spectrogram or voiceprint. "Admissibility of Spectrograph Evidence," 49 *A.L.R.* 3d 915, 917 (1973). Identification of an unknown speaker is made by an examiner who compares the unknown voice with the known voice exemplars of one or more persons. Gorecki, "Comment: Evidentiary Use of the Voice Spectrograph in Criminal Proceedings," 11 *Military Law Review* 167 (Summer 1977). The device does not operate automatically; an individual must operate the machine, adjust numerous controls to obtain readings and subjectively interpret the spectrograms to arrive at an opinion.

The question presented is whether sound spectrograms, or voiceprints, and the opinions of examiners based upon examining and interpreting them, are admissible as valid and accurate scientific evidence in a court of law?

First to review the New Jersey cases. There are three. The precursor is *State v. Cary* whose proceedings spanned a period of three years. A defendant charged with murder was ordered to provide a voice exemplar so that it could be compared on a spectrograph with an unknown voice on a taped recording. He appealed the order as a violation of his right to privacy protected by the Fourth Amendment. In the first *Cary* review, 49 *N.J.* 343 (1967), the court said that "before an intrusion into a person's privacy can be proper within the protections afforded by the Fourth Amendment, the product of the search must have the *capacity* to be admissible in evidence." *id*. at 351. The court noted that the only expert offered below was Lawrence G. Kersta, one of the pioneers in the research of sound spectrograms, and in remanding said "[a]lthough we do not wish to dictate in advance the details of the hearing, we do feel that something more than the bare opinion of one man, however qualified, is required." *id*. at 352.

The trial court then received testimony from four experts (two of whom appeared in the within proceedings), two for each side, and concluded that "at this time there is a lack of general scientific acceptance as to the accuracy of the voiceprint technique." 99 *N.J. Super*. 323, 331 (Law Div. 1968). A second appeal followed, 53 *N.J.* 256 (1969) and, apparently sensing an adverse decision, the state sought an additional opportunity to offer "further expert testimony," *id*. at 258. Because of the far reaching implications of such evidence, the request was granted. But when later advised that the state was "not, at this time, able to furnish any new or significant evidence," the finding of the trial court was affirmed, 56 *N.J*. 16, 18 (1970).

There soon followed *State v. Andretta*, 61 *N.J*. 544 (1972). The trial court had concluded "that the state had failed to meet its burden of establishing general acceptance of the voiceprint method." *id*. at 546. The Supreme Court observed the increased support for the admissibility of voiceprint evidence since *Cary*, but noted that the narrow question presented was whether defendant should be compelled to speak for a voiceprint test, *not* whether such evidence was admissible during the trial. It concluded that defendant should be compelled to submit his voice exemplar. There is no history of what followed on the remand. It is interesting that the court relied upon *United States v. Raymond*, 337 *F. Supp*. 641 (D.D.C. 1972) which was appealed and, although the conviction was affirmed, the trial court's admission of voiceprint evidence was held to be erroneous because "[w]hatever its promise may be for the future, voiceprint identification is not now sufficiently accepted by the scientific community as a whole." *United States v. Addison*, 498 *F*.2d 741, 745 (D.C. Cir. 1974).

The most recent case is *State v. Perez*, 159 *N.J. Super*. 166 (App. Div. 1977) involving tapes made by electronic surveillance of telephones. A monitoring detective, "although not qualified as an expert in voice identification," *id*. at 170, was allowed to give his opinion that the defendant's voice and that of the taped telephone speaker were the same, in spite of the fact that "[n]o scientific basis for the introduction of the spectrographic test results had been placed in the record." *id*. at 170. Thus, *Perez* appears to be of limited application.

At this time, no appellate court in New Jersey has ever concluded that the sound spectrogram, or voiceprint, has attained sufficient scientific acceptance of its accuracy and validity so as to be admissible as evidence during the trial of a case. *cf*., *State of Andretta*, *supra*.

Prior to 1971 courts generally refused to admit voiceprint testimony. Thereafter, several courts accepted such testimony for the limited purposes of issuing an arrest and search warrant, *State ex rel. Trimble v. Hedeman*, 291 *Minn*. 442, 192 *N.W*. 2d 432 (1971), to corroborate aural identification, *Worley v. State*, 263 *So*. 2d 613 (Fla. Dist. Ct. App. 1972), and to compel a defendant in a criminal case to submit a voice exemplar. *State v. Andretta*, supra; *State v. Olderman*, 44 *Ohio App*. 2d 130, 336 *N.E*. 2d 442 (1975). Other courts admitted voiceprint identification evidence as direct and independent proof of the identity of a speaker. *Hodo v. Superior Court*, 30 *Cal. App*. 3d 778, 196 Cal. Rptr. 547 (1973); *Commonwealth v. Lykus*, 327 *N.E*. 2d 671 (Mass. 1975);

United States v. Franks, 511 *F*.2d 25 (6th Cir. 1975); *United States v. Baller*, 519 *F*.2d 463 (4th Cir. 1975). And still other courts rejected such evidence. *People v. Kelly*, 16 *Cal*. 3d 24, 549 *P*. 2d 1240, 130 Cal. Rptr. 144 (1976); *United States v. Addison*, 498 *F*. 2d 741 (D.C. Cir. 1974); *Commonwealth v. Topa*, 471 *Pa*. 223, 369 *A*. 2d 1277 (1977). See generally "Admissibility of Spectrograph Evidence," 49 *A.L.R*. 3d 915 (1973). No clear consensus has emerged throughout the country.

Before a scientific technique may be admitted into evidence, there must be testimony from scientific experts to support and endorse its validity, reliability and veracity. It is not accepted simply because one or more experts urges the court to do so.

The early, and generally widespread, legal test for determining whether a new scientific techique is valid and thus admissible at trial was expounded in *Frye v. United States*, 293 *F*. 1013 (D.C. Cir. 1923):

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable states is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *id*. at 1014.

That same court recently went one step further and said that the acceptance of the scientific community must be "as a whole." *United States v. Addison, supra* at 745.

While the *Frye* test is the one most frequently utilized by courts throughout the United States, several states have authorized a less rigorous test, including New Jersey. *State v. Andretta, supra* at 551-2 directed the trial court on remand:

> "To determine whether any identification arrived at through the use of this method is sufficiently reliable to be admissible in light of the proofs which will be adduced as to what the test shows, and such cross-examination of the State's experts and such opposing proofs as defendants may be able to offer."

It would appear that in New Jersey a new scientific technique would be admissible if it meets either the *Frye* or *Andretta* test.

The husband offered two experts opposing voiceprint. First, Dr. Louis Gerstman, Professor of Psychology, Speech and Hearing Sciences at the City University of New York, who testified that from personal communications with colleagues in the field, acceptance of this technique is "low" because they do not believe that the present state of this system is such that it can validly identify an unknown speaker. He said that at least "30 close colleagues" share this view and the only two professional persons with a scientific background who will go into court to support this technique are Professors Tosi and Truby, both of whom appeared in this case in support of the voiceprint technique.

The husband also offered Dr. Harry Hollien, Professor of Speech and Linguistics and Director of the Institute for the Advanced Study of Communication Processes at the University of Florida, who particularly questioned as unsubstantiated two assumptions which are the basis of the voiceprint technique. First, that "every individual in the world is unique in their speech" and second, that "they were so unique and so unlike everyone else that they could be in and of themselves identified". Neither assumption, he testified, has ever been scientifically proven. He said that the only major work performed in this field was by Professor Tosi, see O. Tosi, et al., *Voice Identification Through Acoustic Spectrography* (1971), which resulted in a six percent error of "false identification" and an additional twelve percent error of "false elimination", i.e., the examiner said the speaker's voice was not in a grouping when it actually was. Professor Hollien said that an 18 percent margin of error was far too high to be acceptable in the scientific community. Moreover, he said that several other scientists who performed more limited tests that Professor Tosi were unable to obtain as low a margin of error as did Tosi. For instance, he discussed a study of Malcolm Hall, a student of Tosi, who had an entertainer, Rich Little, mimic six actors. The actors refused to cooperate so their voice exemplars had to be taken from film and TV clips. The examiner made false identifications, or could not make an identification, in 25% of the cases.

Professor Hollien testified that after the Tosi report was published he polled 50 of the most respected scientists in this field throughout the world, and asked if any had changed their views after reviewing the Tosi report. He received 41 or 42 responses. Three said they had not read the Tosi report, but all of the others who responded said that Tosi had not changed their opinions that the sound spectrograph technique could not validly identify an unknown speaker. Further, he attended a meeting of the Acoustical Society in 1973 in Miami. His effort to poll the members of a committee dealing with the problem was frustrated by the chairman; but after the meeting adjourned he conducted an "on the spot informal poll". Of some 50 members present, 42 said this technique was not valid; the rest abstained. No one voted to support the validity of "voiceprint" technique. Dr. Truby contested the fairness of this vote, but did not refute that it occurred or that the actual vote was as reported by Professor Hollien. The latter also said that to his knowledge the opinion of the scientific community has not changed since taking those polls. Indeed, Professor Hollien presented a "Status Report of 'Voiceprint' Identification in the United States" to the International Conference on Crime Countermeasures, Science and Engineering held at Oxford, England in July, 1977 and concluded that:

> "To continue to use a procedure that has been so seriously challenged—and in areas as socially sensitive as are the courts—is, without question, inconsciencable (*sic*) the unethical. Hence, it is my hope that the "voiceprint proponents will agree to defer application of their process until they can demonstrate its validity to the scientific community."

The wife offered two witnesses in support of sound spectrography: Professor Oscar Tosi, Director of Speech and Hearing Sciences at Michigan State University and Dr. Henry Truby, an independent researcher with prior academic background. It was Professor Tosi who did the only major study in this field, which took three years to complete and involved some 35,000 experimental examinations. While Professor Tosi was very impressive and spoke with great passion and certainty of the validity of his findings, his positive conclusions are based simply on his certainty of the validity of his tests and the fact that, in his opinion, other scientists have not proven him wrong. But this is far different from expressed declarations of acceptance by the scientific community of sound spectrography as a valid method of speaker identification. Dr. Truby's opinion appears to be based in large measure upon his acceptance of the Tosi report, although he had completed some research of his own. Neither could testify as to any polls supporting acceptance of voiceprint by the scientific community; nor could either point to any significant scientific body that endorsed this technique, except for Truby who named some seven or eight "experts" who he said supported his views. On cross-examination, it appeared that three or four of the "experts" were only technicians, and not professional scientists.

The proofs offered in this case clearly fall far short of the test enunciated in *Frye*. Not only is there an absence of proof of "general acceptance" by the scientific community, but the contrary appears to be the fact.

Can we nonetheless conclude that Tosi and Truby demonstrated that identification of an unknown speaker by using their technique is sufficiently valid to be admissible under the *Andretta* test? The response must be negative.

A sound spectrogram is not akin to a fingerprint. The latter have "ridges [that] do not vary. Speech, however, has not been proven to be invariant. Fingerprints cannot be disguised; speech can. Further, fingerprints do not change with age or illness. Whether voices change under these circumstances is uncertain". Note, "Voiceprint Identification", 61 *Geo. L.J.* 703, 725 (1973). Even Professor Tosi opined that sound spectrography is really an art, not a science, and cannot be compared to fingerprinting. He said it is more similar to a handwriting analysis. Both, he said, are based upon subjective determinations made by an examiner.

What this court finds disconcerting is the paucity of major tests and studies. The first limited tests of Professor Lawrence Kersta were conducted some 20 years ago; regrettably, during the intervening period only Tosi has completed a major study. We must have at least one or two other major studies so that we can compare their results and conclusions with those of the Tosi study. *Cary* required "something more than the bare opinion of one man". We now have that. But to be assured that we have a scientific technique which is valid and reliable we also need something more than the bare results of one major study.

The Tosi study while voluminous has several shortcomings. He provided the examiner with a "closed set", which means that the examiner was to compare the unknown voice to a limited number of known voices. In a forensic setting, there are an unlimited number of voices to be compared to the unknown voice. Obviously, the forensic test is more difficult and the percentage of error will be greater.

Tosi provided his examiners with voices made in a laboratory setting with modern equipment. In a forensic setting there often is considerable ambient noise and, moreover, the recording equipment is not as good. Surely this will result in a higher percentage of error.

Tosi provided his examiners with contemporary exemplars, (*i.e.*, made at or about the same time as the unknown voice). In a forensic setting this is not possible. The greater the time lapse, the more difficult it is to compare voices. No one really knows, but it may be significant that in this case the recordings of the telephone conversations were made in April, 1976, while the voice exemplar of the husband was made in February, 1978, some 22 months later.

The spectrograph is an instrument that provides a three dimensional function of speech: time, frequency and intensity. But there are other functions of speech which it does not measure, such as pitch and quality of voice. Should we await the development of an instrument which can measure and record all functions of speech?

Further, we do not know if the group of sound spectrograms given to the examiner by Tosi were persons of similar height, weight, age, etc., who may produce similar spectrograms. This would obviously make it more difficult to select the correct comparison. In a jailhouse line-up identification, the object is to obtain persons who are all similar to the accused in height, weight, color, etc.; if the choices were significantly dissimilar, the result may well be meaningless. The same should be done with a voiceprint test. Presumably this was not done by Tosi.

The opponents of the technique also seriously question the qualifications of the examiners. These examiners are technicians who it is claimed do not possess the scientific education and background necessary to properly operate and assess the results of the spectrograph. Further, the examiners are trained and qualified by Kersta and Tosi, the proponents of this technique, and have never been tested by anyone else. The opponents say this is not proper or acceptable.

Professor Tosi and his supporters start with the proposition that no two persons make the same sound spectrogram with their voice because everyone in the world is unique in their speech. Yet no one has ever verified this assumption. In addition, no one has ever conducted a thorough test to determine if one can change his sound spectrogram, or voiceprint, by intentionally altering his voice; nor do we know if the voiceprint of a mimic is different from that of the person whose voice he is mimicking.

Finally, only one-third of the Tosi tests were made in what can be termed a forensic setting. It is especially disturbing that if these cases are culled and graded, and these are the types of cases we see in the trial courts, the rate of error for "false identification" rises significantly from 6% to 16%.

Professor Tosi testified that 23 states now accept voiceprint evidence. He did not name the states. No evidence has been submitted to substantiate that claim. This court's independent research did not substantiate that claim. Perhaps the confusion arises because Tosi counted cases where any court in a state, including municipal and justice of the peace courts, allowed such testimony, without a preliminary inquiry into the scientific validity and acceptance of the voiceprint technique as has this court. Perhaps he includes New Jersey because of the *Andretta* and *Perez* decisions. If so, his assertions are not entirely accurate and may be nothing more than the normal puffery by the proponent of any new device or instrument.

Suffice it to say that this court perceives many objections and impediments to the admissibility as evidence in a court of law of the results of a sound spectrographic examination. There is particular concern that this evidence, if admissible in this civil case, would obviously also be admissible in a criminal case. While a court can instruct a jury that this evidence is not conclusive and should only be weighed with all of the other evidence, one must recognize that "scientific" evidence of this type has the potentiality to be assumed by many jurors as being conclusive and dispositive. As noted in *United States v. Addison, supra* at 744 "scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen". Here we are not dealing simply with a *link* in the chain of evidence. Here we are dealing with a scientific technique that goes to the very heart of the issue being tried and has the potentiality of usurping, directly or indirectly, the function of the jury.

Admittedly, the burden borne by the proponents of a new scientific technique is a heavy one. But in an era, permeated with man's disbelief in man, perhaps rooted in Watergate, and in which mankind has taken for granted the infallibility of science, somewhat rooted in the successes of space exploration, we should require nothing less.

OPINION OF JUDGE IMBRIANI DECIDED NOVEMBER 20, 1978

IMBRIANI, J.C.C.

It would be worthwhile to first state the long, torturous path along which this bitterly contested divorce case has been litigated.

Dr. Victor D'Arc, a psychiatrist (hereinafter often referred to as the husband) filed suit for divorce on September 24, 1976 on the grounds of extreme cruelty. Due to difficulty in serving the defendant-wife, it was not until March 30, 1977 that Mary Lea J. D'Arc, scion and heiress of the pharmaceutical fortune of Johnson & Johnson, (hereinafter often referred to as the wife) filed an Answer and Counterclaim for divorce on the grounds of deviant sexual conduct and extreme cruelty. On April 20, 1977 the husband amended his complaint to include a count of adultery.

There was extensive pretrial discovery. There was also an interlocutory appeal to the Appellate Division which, amongst other things, ordered the trial bifurcated as to the divorce and financial aspects.

The trial as to the divorce commenced on December 12, 1977. It was apparent at the outset that the trial would be extended and "messy". It was also immediately apparent that neither party had the slightest desire to continue the marriage. Accordingly, both parties, with the consent of the other, amended their pleadings to include a count for divorce alleging eighteen months no-fault separation.

They submitted their proofs and the Court granted a dual divorce to both parties on the ground of eighteen month separation. At the time of the entry of the dual divorce both parties stipulated that when the financial aspects were tried at a later date, each party reserved the right to offer proof of marital fault conduct by the other and that such evidence would be relevant and admissible on the issues of alimony and equitable distribution of marital assets.

The Court also permitted the wife to resume her maiden name of Mary Lea Johnson. Accordingly when referring to the wife hereinafter, the Court will often use her maiden name.

The remaining or financial portion of the trial commenced February 21, 1978. As the result of illnesses of the husband and the Court being assigned to try other cases out of county, the testimony as to alimony and equitable distribution was not concluded until July 27, 1978, after twelve days of actual testimony.

Summations were by written briefs submitted in the latter part of September.

Now for the evidence.

Both were previously married to another spouse and divorced. He had two children, she six. They met while the husband was professionally treating one of the wife's sons. They dated, lived together approximately one year and then married on June 15, 1972. They separated on February 22, 1976, some three years and eight months later. On the day the separated the parties signed an agreement which was prepared by the husband. That agreement is discussed in detail *infra*.

The husband had a private psychiatric practice in New York City prior to the marriage and earned $50,000 per year. After the marriage he continued his practice for a brief period, but because, as he asserted, he had to assume management of his wife's financial affairs, he discontinued his private practice. The wife disputed this claim and, on the contrary, said she urged him to continue his private practice so that he would not be totally dependent on her.

The wife is the beneficiary of a substantial trust fund created by her father with stock in Johnson & Johnson, the international pharmaceutical firm. Independent trustees have absolute discretion in the distribution of both income and principal; her annual income is, and has been for a considerable time, in excess of $1,000,000 annually. During this marriage, except for the small earnings of the husband shortly after the marriage, all of the funds spent by those parties were provided by the wife.

Her monetary contributions to the marriage were considerable. For instance, apart from providing funds to live and maintain themselves and their children in high style, she contributed $1,600,000 to purchase a Far Hills, New Jersey residence; $450,000 to purchase property adjoining the residence; $250,000 to acquire investment property in Bridgewater, New Jersey; $525,000 to acquire real estate in Clinton, New Jersey; $750,000 to acquire personalty and art objects; $200,000 to purchase an apartment in New York City; and much more.

The husband had his own personal bank account during the marriage. He was also authorized to draw checks on his wife's bank account. During the marriage, whenever he needed funds for himself, he merely drew a check upon his wife's account and deposited the funds to his own account. We do not know how much money he so acquired from his wife's checking account, but we do know that she never denied or refused his requests for money.

On the date of separation Dr. D'Arc typed a one sheet agreement, which both promptly signed. The essential terms thereof were that Miss Johnson agreed to pay her husband "tax free alimony of $10,000 per month indefinitely"; further, if he should predecease her, Miss Johnson was to pay all of the "educational expenses" of his two children by his first marriage and "the sum of $25,000 each per year indefinitely".

Any chance at reconciliation was demolished in March and April, 1976 when the wife received information that her husband was negotiating to arrange for her murder. The husband denied the charges and countered with the charge that, in fact, his wife had solicited someone to murder him.

The husband produced a witness who supported his charge. The wife produced a tape recording of telephone conversations, wherein one of the speakers clearly offered the other $50,000 to murder Miss Johnson. The husband denied that he was the speaker in the recorded telephone conversation. The tape recording was admitted following a Rule 8(1) Hearing. See *State v. Cardone*, 146 *N.J. Super*. 23 (App. Div. 1976).

Since these accusations may be relevant on the issues of alimony and equitable distribution, they should be resolved first.

The husband produced Thomas Tracy, a bartender from New York City, who testified that one evening Miss Johnson went to the tavern where he was employed as a bartender and offered to "take care of him" by setting him up in his own tavern if he would "get rid" of her husband "permanently". He said he refused her offer. John A. Clohessey testified that he saw Tracy and Miss Johnson speak to each other at the tavern, but he did not overhear their conversation. Miss Johnson admitted being at the bar and speaking with Tracy, but vehemently denied any discussion about murdering her husband.

The wife put into evidence a tape recording bearing seven different telephone conversations, allegedly between her husband and a Teddy Fino, which conversations took place in New York City. In those conversations the party alleged to be the husband offered Fino the sum of $50,000 to murder Miss Johnson. She claims that Fino purported to go along with the proposal but, in fact, took the recordings to Miss Johnson, presumably with the intent to sell her the original tape and his testimony.

She took a copy of the tape recording to the District Attorney's Office in New York City. That investigation is stalled because of the refusal of Fino to testify before the New York Grand Jury.

The recording was given to a voiceprint expert to compare to a voice exemplar of the husband obtained by Court order. The order was the main reason for the appeal to the Appellate Division. The voiceprint expert was offered by the wife as a witness, but the Court sustained the objection to such testimony on the ground that the voiceprint technique is not presently recognized within the scientific community as being sufficiently accurate and reliable. See the Court's reported decision at *D'Arc v. D'Arc*, 157 *N.J. Super*. 553 (Ch. Div. 1978).

The wife then produced the testimony of herself, her attorney, her son, a friend, and their household maid who each testified that they were familiar with the voice of Dr. D'Arc, the husband, that they listened to the taped telephone recordings and that the voice of the party in such telephone recordings who offered to pay $50,000 for the murder of Miss Johnson was that of Dr. D'Arc.

The Court suggested that the parties submit to a polygraph examination. They agreed. The Court selected an independent polygraph examiner who examined both parties. He testified that in his opinion Miss Johnson was truthful when she said that she never asked Tracy, the bartender, nor anyone else to murder her husband. However, the examiner was unable to provide an opinion with respect to the husband in spite of the fact that he was examined on two different occasions. The examiner said he "felt he [Dr. D'Arc] was not cooperating with me". The husband was hyper ventilating (i.e., controlling his breathing) to such an extent that the examiner was unable to render an opinion.

The husband thereafter retained Natali Laurendi, a self-employed polygraph examiner, who testified that he examined the husband and concluded that he was truthful when he stated that he was not the person on the taped telephone recordings and that he never asked anyone to murder his wife. This Court found several weaknesses in his testimony (see particularly the Court's examination of the witness) and concludes that Natali Laurendi was not a credible witness. While the Court is concerned that the husband apparently intentionally prevented the independent polygraph examiner from obtaining a reading, the Court will disregard and give no weight in its determination to any of the polygraph examinations of Dr. D'Arc.

Based upon the testimony, the Court is satisfied that the husband has not proven by a preponderance of the evidence that his wife asked either Thomas Tracy or anyone else to murder her husband. Indeed, the evidence clearly and convincingly belies such accusation.

Did the wife prove by a preponderance of the evidence that her husband sought to solicit her murder? We must recognize that while the charge is that of a serious criminal accusation, we are dealing with a civil case where the burden of proof is by a preponderance of the evidence, not proof beyond a reasonable doubt.

The Court was very impressed with the credibility of the witnesses who identified the husband as the speaker in the telephone conversations. Particularly credible was Olive Cohen, the housemaid, who testified that one day she heard the voice of Dr. D'Arc in another room, but when she entered, she learned to her surprise that a tape was being played and Dr. D'Arc was not present. Conversely, the Court was not impressed with the credibility of the husband when he denied his complicity.

Further, there were at least four comments made in the seven telephone conversations that corroborate the wife's charges because statements made therein could only be known by Dr. D'Arc, or someone extremely intimate with him.

First, we now know that in March and April, 1976, when the recordings were being made, that Dr. D'Arc was negotiating a possible settlement with the attorney for his wife. The voice identified as that of Dr. D'Arc on the tape was aware of the negotiations and noted that while there was some pressure to get an agreement signed, he was certain he could "stretch out the negotiations for two or three months".

Second, in one of the conversations Fino referred to a "picture" and the other speaker responded with a remark which clearly had reference to his involvement in a motion picture venture. Obviously, the speaker misunderstood, since Fino was referring to a "photograph", which is the normal connotation that anyone without knowledge of the motion picture involvement of these parties would attach to the word "picture". We know that these parties were involved as investors in several motion pictures. In that same conversation, when he realized that Fino was referring to a "photograph", the speaker noted that he knows where his wife is throughout the day and that there are pictures (i.e., photographs) of her at the art gallery, another venture in which these parties were involved.

Third, and especially damaging, the voice on the tape identified as that of Dr. D'Arc stated as early as April, 1976 that he preferred that the murder take place while he was out of town and that he intended to be in Texas on May 4, 5 and 6. Dr. D'Arc testified in Court that he called the attorney for his wife on May 4 from Kennedy Airport, as he was about to fly to San Antonio, Texas for a three day conference. Who but Dr. D'Arc would have known in early or mid-April that he planned to be in Texas for those three days?

Fourth, the person identified as Dr. D'Arc on the tape said it was not "acceptable" that Miss Johnson be "shot down in the street", and insisted that "I'd like it to be, you know—a mugging". One must ask, who would be concerned with how Miss Johnson was murdered? Patently, whoever would fear that he would be looked upon as a likely suspect. And who would best fit that description, but an estranged spouse who would stand to gain a share in the estate of his extremely wealthy wife.

Accordingly, considering the credibility of the wife and her witnesses who, positively identified Dr. D'Arc as a speaker in the telephone conversations, the lack of credibility of Dr. D'Arc himself, and the corroboration of some of the statements on the tapes, this Court is satisfied that Miss Johnson has proven by a preponderance of the evidence that her husband, Dr. D'Arc, was the person on the taped telephone recordings who offered Fino $50,000 to murder her.

This being so, is the husband entitled to alimony? On principles of equity, he certainly is not. Nevertheless, the husband urges that this Court cannot deny alimony because the Court granted both parties a divorce on no-fault grounds and *N.J.S.A.* 2A:34-23 expressly provides that fault may not be considered in awarding alimony where the judgment of divorce "is granted solely on the ground of separation", as occurred here.

The Court could, of course, amend the judgment of divorce to add a clause that the wife is also granted a divorce on the grounds of extreme cruelty. However, in this case the parties clearly stipulated, at the time when we aborted the initial trial to grant a divorce on grounds of no-fault, that both parties, during the trial on alimony and equitable distribution, could offer proof of fault and that it would be considered by the Court on the questions of alimony and equitable distribution. Based on that stipulation alone, this Court believes that fault may be, and should be, considered on the issue of alimony.

Even if "fault" could not be considered, it is clear that on the merits Dr. D'Arc is not entitled to alimony. Alimony is based upon "need" and in determining that issue we should inquire into the income of the spouse seeking alimony. *Capodanno v. Capodanno,* 58 *N.J.* 113 (1971); *DiTolvo v. DiTolvo,* 131 *N.J. Super.* 72 (App. Div. 1974). Not only is Dr. D'Arc not in "need" of support, but the record clearly shows that he is able to provide a comfortable living for himself.

He is a physician specializing in psychiatry now earning $40,000 per year with potential to earn far greater sums in the future. While it is true that he will not be able to maintain the same lavish level of living which he enjoyed while married to Miss Johnson, it cannot be said on this record that Dr. D'Arc in the space of approximately 3 1/2 years of marriage has become so accustomed to that style of living which he enjoyed while married to her that he is now entitled to be maintained by her in that same style.

The Court is satisfied that Dr. D'Arc is not entitled to receive alimony from Miss Johnson.

But is he entitled to enforcement of the February 22, 1976 agreement in which Miss Johnson agreed to pay Dr. D'Arc $10,000 per month tax free? As noted in *Carlsen v. Carlsen*, 72 *N.J.* 363, 370 (1977):

> "As a contract between husband and wife, the agreement is unenforceable at law. (cases cited). Such a contract may, however, be enforced in equity if found to be fair and equitable."

The traditional rule in New Jersey is that contracts between husband and wife are generally unenforceable at law because usually a husband has a dominant influence over his wife. *Cohen v. Cohen*, 121 *N.J. Eq.* 299 (Ch. 1936). Before such a contract will be enforced in equity, the Court will carefully scrutinize it to make certain that the wife has not been defrauded or coerced by undue influence or improper conduct by her husband. *Wolff v. Wolff*, 134 *N.J. Eq.* 8 (Ch. 1943).

Generally, when a wife has not been represented by an attorney any agreement between spouses will be set aside, unless the husband can affirmatively demonstrate that he has dealt "fairly and justly with his wife", *Ferrante v. Philpott*, 1 *N.J. Super.* 393, 396 (Ch. 1948).

In this case the evidence is clear that the wife was not represented by an attorney at the time she signed this agreement, in spite of the fact that for many years she had retained counsel in New York City with whom both she and Dr. D'Arc conferred frequently on business and tax matters. The wife testified candidly that she signed the agreement voluntarily after reading it. She testified that she understood the $10,000 tax-free monthly payment was not intended as alimony, but was merely an allowance, because she did not intend to seek a divorce at that time. Yet, the agreement provided that it should be incorporated into a divorce decree, if one was obtained.

This Court concludes that the agreement of February 22, 1976 is not clear on its face as to what the parties intended, especially as to whether it constituted what the parties thought to be fair and equitable as alimony should the parties ever divorce, which was a course of action neither apparently sought at that time. Further, the Court is especially concerned that the husband permitted his wife to sign this agreement when he well knew that she had retained counsel in New York City with whom she has dealt for many years and that she invariably sought his legal advice whenever a legal or business problem arose. Yet, he never suggested to the wife, who has had limited business experience, that she seek the independent advice of her attorney. Evidence of the unfairness and unjustness of the agreement was given by the attorney for Miss Johnson who testified that, because of Miss Johnson's income tax bracket, this agreement would cost her about $400,000 per year, a not insignificant portion of her income.

Under these circumstances, the Court finds that it would be unfair, unjust and inequitable to enforce the February 22, 1976 agreement.

Before I inquire into what assets are subject to equitable distribution, I shall first address myself to the question of whether "marital fault" should be taken into consideration by the Court on such issue.

A few preliminary observations. First, there is no statutory bar to considering "fault" in dividing the marital assets. Our statute is silent.

Second, it is the general rule that a person who murders a spouse is barred from claiming a share of the estate of the deceased spouse. *Small v. Rockfeld*, 66 *N.J.* 231 (1974). Should such a bar vanish if the attempt to murder one's spouse was unsuccessful? Of course, Dr. D'Arc argues that he is not seeking a share of "his wife's estate", but rather a fair and equitable share of "our estate". Is his argument a matter of semantics?

Third, Dr. D'Arc asks this Court to give him an *equitable* share of the marital assets, and simultaneously denies the applicability of the *equitable* doctrine of unclean hands, which is based on the premise that one should not profit from his wrongdoing. The husband points to *N.J.S.A.* 2A:34-7 which abolished the doctrine of unclean hands as a defense in matrimonial actions. Does that statute apply to equitable distribution of marital assets? This Court thinks not.

Rothman v. Rothman, 65 *N.J.* 219, 228-9 (1974) stated that the philosophy bottoming our policy of equitable distribution of assets is two-fold. First, to provide the less financially secure spouse (usually the wife) with protection in the event the spouse paying alimony should die or experience financial misfortune, thereby leaving the spouse receiving alimony destitute. Second, to provide both spouses with a share of the family assets accumulated during the marriage, so as to divide marital assets on the concept that "marriage is a shared enterprise, a joint undertaking, that in many ways. . . . is akin to a partnership". *id.* at p. 229.

Pursuant to that philosophy *Chalmers v. Chalmers*, 65 *N.J.* 186 (1974) said:

> "Should matrimonial fault be one of the criteria or circumstances that may properly be taken into account [in the equitable distribution of assets]? We conclude that the answer must be in the negative even though the statute speaks of 'equitable

> distribution'. Indeed, we are satisfied that the concept of 'equitable distribution' requires that fault be excluded as a consideration." *id.* at p. 193.

The Court then gave two basic reasons for this holding. First, "fault may be merely a manifestation of a sick marriage", *id.* at p. 193, and only reflects how a person reacted to a marital problem which may not be of his or her making. Second, the Court repeated the partnership or shared enterprise theory that each contributed to the marital estate and we are merely giving to each what really belongs to him or her.

A surface analysis of these cases would support the argument that fault should not be a consideration. But here we have facts which distinguish this case from *Chalmers*.

Here Dr. D'Arc contributed little, if anything, to this marriage and, indeed reaped handsome financial benefits during the marriage. There was never any "partnership" or "shared enterprise". He merely shared in the enormous sums of money that his wife received from her father's trust fund. There was never any "giving" by the husband in the usual sense that we use that word with respect to a marriage—he simply received throughout the short period of the marriage.

Further, here we are not dealing with the usual type of "fault" where the conduct of one spouse may merely be a reaction to the faults or shortcomings of the other spouse. Here the "fault" is an attempt by Dr. D'Arc to commit one of the most heinous crimes known to mankind—murder.

Dr. D'Arc recites platitudes that "equity does not repel all sinners", citing *Garlinger v. Garlinger*, 137 *N.J. Super.* 56, 62 (App. Div. 1975) and that "the Court is not the keeper of public morals". But where a spouse has committed an act that is so evil and outrageous that it must shock the conscience of everyone, it is inconceivable that this Court should not consider his conduct when distributing the marital assets equitably. I note that one Court did invoke "fault" to deny a wife an interest in the family residence, despite the fact that the marriage existed for sixteen years. *Sanders v. Sanders*, 118 *N.J. Super*. 327 (Ch. 1972).

The obligation of this Court is to implement the purpose of law, which is to do justice, and not to mechanically apply established principles of law, even when they compel an absurd result. To ignore the facts of this case would be tantamount to permitting Dr. D'Arc to obtain by indirection that which he failed to obtain by a direct attack upon the life of his spouse. He may not obtain through the back door that which he is barred from taking through the front door.

I would also note that, apart from the legal merits of this issue both parties stipulated that fault would be relevant on the issue of equitable distribution.

I note that the state of title is of no significance when dividing marital assets. A spouse, for instance, does not acquire a vested right to property merely because an asset is put in sole name of that spouse or in their joint names. *Perkins v. Perkins*, 159 *N.J. Super*. 243 (App. Div. 1978). All assets acquired during the marriage in which either spouse has an interest, regardless of how acquired or what the state of title may be, are subject to equitable distribution.

What should the husband be awarded from the assets of this marital partnership? All of the money was contributed by Miss Johnson. The assertion of Dr. D'Arc that he managed the financial affairs of his wife is unsupported by the facts. At best the proofs showed that these parties used funds acquired from the wife's trust fund to participate in several property acquisitions, investments in art objects and investments in motion picture and theatre ventures which were more in the nature of entertainment, than true commercial ventures to earn income. Indeed, it is apparent that these parties were incredibly inept in such ventures.

There was no credible evidence offered by either party of the value of the marital assets. Both generally relied upon cost values.

The husband urges that he be awarded the entire interest in the U. N. apartment and stock of Bernards State Bank (or proceeds from their sale) and that all of the remaining assets be divided equally. The Court notes that while the record discloses most of the assets, it is not disputed that Dr. D'Arc removed many art objects to an undisclosed location, which in the opinion of counsel to Miss Johnson, had a value of approximately $200,000. Nor did he account for the proceeds of various bank accounts that he withdrew or life insurance policies that he cashed and admittedly used for his personal living expenses.

On the other hand the wife urges that all assets, be they real estate, art objects, stock, interests in film projects and theatre plays, or bank accounts be conveyed into her sole name. Many of these items are in their joint names.

Considering all of the circumstances, the Court finds that equity dictates that the vast bulk of these assets should be returned to Miss Johnson. Dr. D'Arc shall be permitted to retain a certain few assets. Candidly, the Court believes that Dr. D'Arc is entitled to nothing, but to compel an accounting of assets which he has secreted or already expended may well be a venture in futility and consume inordinate time of counsel and the Court.

Accordingly, the Court directs that all of the following assets, or any interest that the parties have or may hereafter acquire therein, shall be conveyed forthwith to Miss Johnson:

1. All real property in Far Hills, New Jersey whether held in the individual names of the parties or in corporate name, such as Far Hills Nursery, Inc.

2. All of the stock in Merriewold West, Inc. and any other corporation formed for the purpose of dealing in art objects.

3. All art objects, including those removed by the husband from the inventory of Merriewold West, Inc., not sold prior to December 20, 1977.

4. The cash funds now held in escrow by Wharton, Stewart & Davis, attorneys, following the sale of real property in California.

5. All real property in Bridgewater, New Jersey.

6. All stock in the Bernards State Bank.

7. All interest of the parties in and to certain properties in Clinton, New Jersey, including the $50,000 Certificate of Deposit being held by the husband in a New York City bank.

8. All right, title and interest in and to all film projects and theatre plays.

The husband shall be permitted to retain the net proceeds from the sale of the U. N. apartment which he claimed amounted to $120,000, the cash proceeds of $16,000 received from the sale of 1,000 shares of stock in Bernards State Bank, the relatively small bank accounts and life insurance policies which he cashed and appropriated to his sole use in the estimated amount of $25,000, and the proceeds that he realized from the sale of art objects sold prior to December 20, 1977, the date of the Judgment of Divorce. The amount of these latter proceeds is not and perhaps never will be known since Dr. D'Arc was less than candid concerning what art objects he removed, what he sold, or where the remainder of such art objects are stored. Miss Johnson shall be permitted to take the deposition of Dr. D'Arc to secure as much information as she can about what art objects remained in possession of Dr. D'Arc on December 20, 1977.

It is understood that to whatever extent Dr. D'Arc has any interest in the assets that are to be conveyed to his wife pursuant hereto, he shall cooperate in every way to effect such conveyances, including, but not limited to, execution of any and all deeds, stock transfers, and other documents. He shall also submit his resignation from any and all positions and offices which he occupies therein. Of course, it is understood that to the extent Dr. D'Arc shall be liable on any mortgage, lien or indebtedness incurred to acquire any of the assets to be conveyed to Miss Johnson, she shall be solely responsible to pay such mortgage, liens and indebtednesses, and shall hold Dr. D'Arc free from any liability thereon.

Finally, the attorney for Dr. D'Arc has submitted a bill for legal services in the amount of $63,163.07 which he asks Miss Johnson to pay. Dr. D'Arc testified that he has already paid $30,000, leaving a balance due of $33,163.07. In determining whether an award of counsel fees should be made the Court should look at the respective liquid assets of the parties, *Lavene v. Lavene*, 148 *N.J. Super.* 267 (App. Div. 1977), the complexity of the issues, including the time spent by counsel in trial preparation and in Court, *Mayer v. Mayer*, 150 *N.J. Super.* 556 (Ch. 1977), and whether the husband institutes the action in good faith. *Williams v. Williams*, 59 N.J. 229 (1971).

Certainly this was a difficult and complex case and the wife has ample means to pay the counsel fee of her husband. The Court is mindful of its findings on the charge of murder, but it must be appreciated that the husband may well have believed that in spite of such a finding he was nonetheless entitled to alimony and a substantial share of the marital assets. The law in New Jersey on this point is by no means clear.

Under the circumstances, this Court directs Miss Johnson to pay $15,000 of the counsel fee of Dr. D'Arc's attorney. In addition she shall pay the fee submitted by Earl Kane, the Court appointed polygraph operator.

Counsel for Miss Johnson shall submit an appropriate order under the five day rule.

OPINION OF
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DECIDED OCTOBER 10, 1980

Argued September 23, 1980 - Decided October 10, 1980

Before Judges Matthews, Morgan and Morton I. Greenberg.

On appeal from the Superior Court, Chancery Division, Somerset County, whose opinion is reported at 164 *N.J*. Super. 226 (1978).

Monroe Ackerman argued the cause for appellant-cross respondent (Mr. Ackerman and Neil Braun on the brief).

Richard H. Thiele, Jr. argued the cause for respondent-cross appellant (Herold & Ragsdale, attorneys).

The opinion of the court was delivered by MORTON I. GREENBERG, J.A.D.

Plaintiff appeals and defendant cross appeals from a final judgment dated December 1, 1978 dealing with the alimony, equitable distribution and counsel fee aspects in this divorce action. This judgment covered only these financial matters as the case had been bifurcated and a divorce granted on December 20, 1977. At the conclusion of the trial Judge Imbriani filed a written opinion in which he set forth his findings of fact and conclusions of law. 164 *N.J. Super*. 226 (Ch. Div. 1978). We accept his findings of fact which are fully supported by the record. *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 *N.J*.

474, 483-484 (1974). Consequently the judgment of December _, 1978 is affirmed substantially for the reasons set forth in the written opinion of Judge Imbriani except as modified herein and subject to the additional comments we make. Our decision, however, is not to be deemed to have affirmed the interlocutory order of Judge Imbriani entered as a result of his opinion reported at 157 *N.J. Super.* 553 (Ch. Div. 1978). The record before us is not adequate for us to review that decision and in any event since the tape was admitted on another ground it is not necessary to decide the issue.

A preliminary question exists as to whether we should even consider plaintiff's appeal. The trial court by orders dated March 27, 1979 and June 11, 1979 directed plaintiff to comply with the judgment in particular acts. Plaintiff did not comply with the orders. Consequently defendant obtained a further order on June 29, 1979 for a warrant for plaintiff's commitment. *R.* 1:10-5. The warrant was issued on the same day. It recites that plaintiff is to be committed until he furnishes defendant with a record of safe deposit box entry, returns to her art works and items of personal property and turns over to her a $50,000 certificate of deposit as well as stock in Bernards State Bank or the proceeds thereof. The warrant has not been served because plaintiff is in New York. Counsel for defendant has indicated that there are difficulties in making service there. But regardless of the legal enforceability of the order in New York plaintiff had an obligation to comply with the order of Judge Imbriani since no stay was issued pending appeal. In the circumstances in view of the willful default of plaintiff we would be fully justified in dismissing his appeal and confining his participation before us to opposition to defendant's cross appeal. *See Sarner v. Sarner*, 45 *N.J. Super.* 216, 221-222 (App. Div. 1957), certif. den. 25 *N.J.* 103 (1957); *Kirchner v. Kirchner*, 5 *N.J. Super.* 341 (App. Div.

1949); cf. *Mahne v. Mahne*, 66 *N.J.* 53 (1974) (court more inclined to dismiss complaint than suppress answer when privilege against self-incrimination invoked by a party); *R.* 4:37-2(a) (complaint may be dismissed if plaintiff fails to comply with order of court). But since the practical consequence of determination of the cross appeal results in disposition of plaintiff's appeal we have decided to consider the appeal on the merits.

Plaintiff asserts that the tape recording of his alleged conversations should not have been admitted because it may have been the product of illegal wiretapping and thus inadmissible. 18 *U.S.C.* §2511. The point is without merit. The testimony of defendant at trial showed that one of the parties to the conversation, Theodore Fino, told her he made the tape. Though defendant's testimony was hearsay it nevertheless could be considered in a preliminary proceeding under *Evid. R.* 8 to determine admissibility of the tape, particularly since defendant could rightly regard Fino as not available. *State v. Moore,* 158 *N.J. Super.* 68, 80-84 (App. Div. 1978). In any event there is no showing of illegal wiretapping, only speculation by plaintiff.

Plaintiff argues that his conduct should not have been considered as germane in denying him alimony. We agree with the trial court that by stipulation defendant reserved her rights to assert plaintiff's fault on this issue.

The only points on which we disagree with Judge Imbriani are raised by defendant's cross appeal. She objects to distribution to plaintiff of any assets derived from her and partial allowance of his counsel fees against her. With respect to equitable distribution Judge Imbriani indicated that:

> Candidly, the court believes that Dr. D'Arc is entitled to nothing, but to compel an accounting of assets which he has secreted or already expended

> may well be a venture in futility and consume inordinate time of counsel and the court.

We agree with Judge Imbriani that plaintiff is entitled to nothing by way of equitable distribution of any assets derived from defendant. We also agree that attempting to collect the assets may be an exercise in futility. Certainly plaintiff's failure to comply with the prior post-trial orders is not encouraging. But nevertheless plaintiff cannot be permitted to obtain any distribution from a woman whom he tried to have murdered. Further his contribution to the monetary status of defendant was to help her spend her money. We are quite clear that she cannot be denied the recovery of her assets on the pragmatic theory that the order will be difficult to enforce. Judgments are often entered in circumstances where their satisfaction is doubtful. Thus we reverse the order of December 1, 1978 insofar as it awards to plaintiff the proceeds of sale of the United Nations apartment asserted to be $120,000, the cash proceeds of $16,000 received from the sale of 1,000 shares of stock in Bernards State Bank, the small bank accounts and life insurance policies which he cashed and from which he took the proceeds of about $25,000 and the proceeds from the sale of the art objects sold prior to the divorce on December 20, 1977. While the precise amounts of these items have not been established defendant is entitled to them. We will remand this matter for further proceedings by the trial court to determine precisely what is owed defendant.

The court allowed plaintiff a counsel fee on the theory that notwithstanding his attempt to have his wife murdered he may have considered himself entitled to alimony and a substantial share of the marital assets. Perhaps this is so but nevertheless we consider that it is an abuse of discretion to award counsel fees in the extraordinary circumstances of this case.

The judgment of the Superior Court, Chancery Division, is affirmed except insofar as it awards plaintiff an equitable distribution of assets and a counsel fee from defendant. As to these items it is reversed. The award of counsel fees is deleted. The matter is remanded to the trial court for entry of a final judgment in favor of defendant as to the items previously distributed to plaintiff. If necessary supplementary proceedings may be conducted in that court to determine exactly what is due defendant within the framework of this opinion. We do not retain jurisdiction.

A TRUE COPY

/s/Elizabeth McLaughlin

ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED SEPTEMBER 1, 1977

(Filed September 6, 1977)

Moving Papers Filed—August 25, 1977

Answering Papers Filed

Date Submitted to Court—August 30, 1977

Date Argued

Date Decided—September 1, 1977

ORDER

This matter having been duly presented to the Court, it is hereby ordered as follows:

Motion for Leave to Appeal and for Stay of Chancery Division Order of August 11, 1977 Pending Appeal—Denied

Supplemental:

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin

Clerk

For the Court:

/s/ Robert A. Matthews

P.J.A.D.

Witness, the Honorable Robert A. Matthews, Presiding Judge of Part M, Superior Court of New Jersey, Appellate Division, this 1st day of September 1977.

/s/ Elizabeth McLaughlin

Clerk of the Appellate Division

ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED SEPTEMBER 1, 1977

(Filed September 16, 1977)

Moving Papers Filed—August 29, 1977

Answering Papers Filed

Date Submitted to Court—August 30, 1977

Date Argued

Date Decided—September 1, 1977

ORDER

This matter having been duly presented to the Court, it is hereby ordered as follows:

Motion for Leave to Appeal—Granted

Supplemental: Under R. 2:11-2 We proceed to merits. Order for support pendente lite is affirmed provided that plaintiff submit to voice test ordered August 10th 1977.

Motion to sever is denied. Trial Judge is directed to bifurcate substantive matrimonial issues from equitable distribution issues and to try matrimonial issues first.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin

Clerk

For the Court:

/s/ Robert A. Matthews

P.J.A.D.

Witness, the Honorable Robert A. Matthews, Presiding Judge of Part M, Superior Court of New Jersey, Appellate Division, This 1 day of September 1977.

/s/ Elizabeth McLaughlin

Clerk of the Appellate Division

DECISION OF THE SUPREME COURT OF NEW JERSEY
DATED DECEMBER 9, 1980
(Filed December 10, 1980)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1128-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 9th day of December, 1980.

/s/ Stephen

Clerk

COMPLAINT FILED SEPTEMBER 20, 1976 IN THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION

(Filed September 30, 1976)

Plaintiff, VICTOR D'ARC, residing at Merriewold West Farm, in the Borough of Far Hills, County of Somerset and State of New Jersey, complaining of the defendant, says as follows:

FIRST CAUSE OF ACTION

1. The plaintiff, Victor D'Arc, and the defendant, Mary Lea J. D'Arc, were married on the 15th day of July, 1972, in the City, County and State of New York, and said marriage still subsists.

2. The plaintiff and defendant were bona fide residents of the State of New Jersey when this cause of action arose and have ever since and for more than one year last past continued to be such bona fide residents.

3. The defendant, Mary Lea J. D'Arc, is a resident at Merriewold West Farm, in the Borough of Far Hills, County of Somerset and State of New Jersey, but is temporarily residing at 425 East 83rd Street, in the City, County and State of New York.

4. No children have been born of the aforesaid marriage.

5. The defendant, Mary Lea J. D'Arc, has been guilty of extreme cruelty toward the plaintiff, Victor D'Arc, which cruelty commenced shortly after the marriage and continued down to the present date. Said acts of extreme cruelty are more particularly described as follows:

(a) At the time the parties were married the plaintiff was a physician who specialized in psychiatry. The defendant was and still is a woman of substantial wealth. Although the plaintiff was successful in his field, there was a large disparity between their respective assets and income. The plaintiff had an income of approximately $50,000.00 per year while the defendant had an income of approximately $900,000.00 per year from a trust fund with corpus of approximately $85,000,000.00. At the defendant's request and then by the mutual agreement of the parties, it was decided in the best interests of the stability of the marriage that the plaintiff would withdraw from the practice of medicine and devote his full time, in partnership with the defendant, to the investment and management of the defendant's huge income and assets. Thereafter, relying on the understanding and agreement of the parties, the plaintiff began to withdraw from the practice of medicine and in place thereof he began to devote his time more and more, in conjunction with the defendant, to the management and investment of the defendant's assets aforesaid. In short order, however, it became apparent to the plaintiff that, although he and the defendant had agreed to act in partnership in the management of their affairs, in actuality the defendant had no intention to and in fact did not relinquish any of her authority to the plaintiff but, on the contrary, at every turn she undermined and destroyed the plaintiff's ability to function in the management of their affairs, thereby leaving plaintiff frustrated, humiliated and embarrassed.

(b) The humiliation and embarrassment which the plaintiff suffered at the hands of the defendant was not, however, limited to business affairs. It also extended to household and personal matters. Thus, the defendant would request the plaintiff's aid, advice and his intervention in connection with the problems defendant's children were having. When the plaintiff lent his best efforts to resolve the children's problems, he suddenly would find that the defendant had, without his knowledge made other arrangements with the children, thereby making the plaintiff appear impotent and ineffectual in the eyes of the children and causing plaintiff further embarrassment and humiliation.

(c) Shortly after the marriage in the year 1972, the defendant, because several of her boys had been accused by the authorities of being both users and dealers in narcotic drugs and because of several raids by the police on the parties' homes in Bedminster and Far Hills, New Jersey, discussed with the plaintiff the pros and cons of how to deal with the situation. The plaintiff and defendant agreed that they would not permit certain of her children's friends to visit on the parties' property. When the plaintiff was not present, however, the defendant on several occasions gave permission to her children to invite these undesirable friends, whom the plaintiff and defendant had agreed to exclude from their home. This completely undermined the plaintiff's position in the marital home in so far as defendant's children were concerned.

(d) During the year 1972, shortly after the plaintiff and defendant purchased the Merriewold West Farm, the plaintiff and defendant and the plaintiff's son, Roderick, discussed the purchase of a new tractor. Roderick desired to participate in the farming operation with the two resident farmers. It was eventually agreed that Roderick would collaborate with one of the resident farmers in selecting a proper tractor. Despite this understanding, however, the defendant permitted Roderick to purchase the tractor on his own and without the farmer's advice. This caused the plaintiff considerable embarrassment in front of the farmer to whom he had to make excuses. The tractor which the boy purchased was too large for its purpose and the farmer traded it in the following year for a smaller one.

(e) The defendant's son, Roderick, from the very outset of the marriage was hostile and defiant toward the plaintiff. Although the plaintiff on numerous occasions discussed this child's behavior with the defendant, the defendant refused in any manner to discipline the child. The child's behavior became so negativistic that during the year 1973 the boy administered a large dose of heroin to the parties' dog, thereby severely injuring the animal. Even after this atrocious behavior, the defendant refused to discipline her son. It was not until three months later, after several more hostile and defiant acts by the boy, that it became absolutely necessary for the plaintiff and defendant to order the boy out of the household.

(f) In the fall of 1972, the defendant's sons, Roderick and Seward, were arrested on drug possession charges. The defendant refused in any manner to discipline these children, although she was urged by the plaintiff to do so. As the situation worsened, defendant finally asked the plaintiff to use his influence to have her son, Seward, hospitalized. Seward had devised a plan to blow up the Far Hills Police Station in an effort to obtain the evidence the police had seized when they raided the marital home. Despite the fact that the plaintiff thereupon instantly cooperated with the defendant, the defendant nevertheless soon reverted to her former mode of permitting her children to do that which they desired and refused to discipline them, although on numerous occasions she promised the plaintiff to correct this situation. It was, in fact, not until some time in 1974, that the defendant heeded plaintiff's advice and cut off Seward's huge allowance and forced him to obtain employment.

(g) In late 1972, the defendant's eldest son, Eric, asked the defendant for a new automobile. The defendant sought the plaintiff's advice on this matter and after a discussion between the plaintiff, the defendant and Eric, it was agreed that a reasonable price for a new car would be $5,000.00. Much to the plaintiff's chagrin, he later learned, from Eric, that the defendant had paid $8,500.00 for the new automobile.

(h) During the year 1974, the defendant's son, Quentin, came to live with the plaintiff and the defendant. For the previous two years he had resided in his father's household, a residence which he considered harsh and unreasonable. From the time the boy came to live with the plaintiff and defendant, the defendant did nothing to help him re-establish himself as a member of the family and as a member of the household. As a matter of fact, it was at this period of the parties' life that the plaintiff began to lose his respect for the defendant. He began to realize, observing the defendant's behavior pattern with this child, and with her other children, that she was not concerned with their true welfare. Because of the defendant's indifference to this boy, the plaintiff made all arrangements for the boy's schooling in New York City. When the boy began to have academic difficulties the plaintiff obtained tutors for him in all subjects. The defendant on the other hand never showed any interest and never inquired into the child's academic problems and, in fact, resented the plaintiff's spending so much time with her son, even though the time was spent in the boy's best interests. The following summer the plaintiff made arrangements for this boy to attend The Choate Rosemary Hall School in Wallingford, Connecticut, in order that the boy make up some credits prior to his enrolling in the Lawrenceville School in Lawrenceville, New Jersey. The boy had been accepted at the Lawrenceville School through the plaintiff's efforts. Unfortunately, the boy was dismissed from The Choate Rosemary Hall School because of a threat by him to do serious harm to another student because the other student threatened to inform the administration that he was in the possession of drugs. In spite of this, the plaintiff was still able to persuade the Director of Admissions at the Lawrenceville School to accept the boy conditionally. Within a few days of the boy's admission to the Lawrenceville School, however, he was apprehended selling LSD to several students. After consultation by the plaintiff and the school psychiatrist it was decided to admit the boy to the Adolescent Division of the Institute of the Pennsylvania Hospital in Philadelphia under the care of a Dr. James A. Brecht. During the boy's entire stay at this institution, a period of approximately eight months, the defendant, much to the annoyance of the plaintiff, never once called Dr. Brecht to inquire after the boy's welfare. The only communication she had with Dr. Brecht was when the doctor called her, nor did the defendant ever inquire of the plaintiff as to what was accurring with her son and only responded minimally when plaintiff spoke to her about the boy's condition.

(i) During the year 1974, the defendant conferred with the plaintiff about her sons' allowances. She was giving each son an allowance of $15,600.00 per year. The defendant and the plaintiff agreed on a method of how to handle the $6,000.00 yearly trust fund income which each boy would receive on reaching the age of 21 years. That plan was that as each child reached 21 years of age, their allowance of $15,600.00 per year would be reduced by the sum they received in trust income. The defendant asked the plaintiff to tell the boys about the decrease in their allowance, which decrease would be made up with their trust income. After the plaintiff and defendant informed the boys about this decision, the defendant, nevertheless, continued to give them their full allowance of $15,600.00 per year and, in addition thereto, they received their trust income of $6,000.00 per year. The plaintiff learned about this decision by the defendant through their secretary. Upon learning of this decision, the plaintiff felt both used and foolish. The defendant had used him to do the "dirty work" with her children and then had undermined him by doing as she pleased.

(j) Shortly after the marriage, in the year 1972, and after the parties were residing in Far Hills, New Jersey, they were approached by a neighbor who was the Chairman of the Local Planning Board. This gentleman asked the plaintiff and defendant to participate actively in local Municipal affairs. Plaintiff and defendant discussed the neighbor's offer at some length and it was agreed between them that the plaintiff would accept a position on the local Planning Board if it were offered. Much to the plaintiff's surprise, however, when the offer was made it was accepted by the defendant without any discussion with the plaintiff, causing the plaintiff great embarrassment in front of the neighbor. Plaintiff thereafter discussed his embarrassment and humiliation with the defendant. She admitted she was wrong and promised not to repeat this type of treatment. As can be seen, however, from subsequent events, enumerated hereafter, defendant did not keep her promise.

(k) During the year 1973, the plaintiff served as a Trustee of the Somerset County Drug Work Shop, an organization formed in the county to combat the drug problem. The defendant from time to time attended meetings of this organization with the plaintiff. When the organization held its annual fund drive, the defendant attended one of the meetings without the plaintiff. At this meeting she pledged a contribution of $10,000.00. She never told the plaintiff of this contribution. The plaintiff, much to his embarrassment, learned of the pledge only when the secretary of the organization requested the check.

(l) In the spring and summer of the year 1974, the defendant became interested in developing a business partnership with an art dealer who owned an art gallery in New York City. The defendant asked the plaintiff's advice on whether or not she should become involved in this business partnership. After a prolonged discussion between the plaintiff and defendant it was agreed that they would invest $30,000.00 in this partnership. The defendant, however, surreptitiously and without informing the plaintiff, from time to time, advanced additional large sums of money to the art dealer. The plaintiff only learned about these advances when he received calls from their accountant stating that they were spending more money than was coming in. Despite the fact that plaintiff attempted to warn the defendant about the overreaching of this art dealer, the defendant refused to listen and continued to advance money to the art dealer without the plaintiff's knowledge. She finally invested approximately $240,000.00 in this venture. On one occasion this art dealer talked the defendant into purchasing an artist's entire show before the show even opened. The defendant paid $40,000.00 for these paintings. The plaintiff learned of this transaction from the art dealer who behaved toward the plaintiff in a condescending and belittling manner, knowing that he had duped the defendant and, hence, he acted as though he had put "something over" on the plaintiff who had been seriously trying to protect the defendant's interest.

(m) During the year 1972, the plaintiff and defendant formed a corporation known as Merriewold West Gallery, Inc. through which corporation they arranged to put on a show of outdoor sculpture at their farm in Far Hills, New Jersey. The parties agreed between themselves and with their curator that the budget for the show would be $40,000.00. It was the plaintiff's responsibility to attempt to keep the show within its budgetary limits. The defendant, however, surreptitiously and without discussing the matter with the plaintiff agreed from time to time with the curator to incur additional expenses. The defendant never told the plaintiff about the additional expenses which she authorized. He learned of them thereafter through their secretary. Because of these additional advances by the defendant, the show eventually cost $100,000.00 instead of the agreed upon $40,000.00. When this same show was put on the following year the defendant again undermined the plaintiff's position. One day the plaintiff arrived home to find an artist building a post and rail fence through the sheep fields off of their driveway. He learned from their secretary that the defendant had authorized this "art work" without speaking to him. It became so that all of the people who were involved with the plaintiff and defendant, either as employees or otherwise, learned that no matter what the plaintiff and defendant agreed upon jointly in their presence, they could later talk to the defendant alone and get her to make a different unilateral decision. This constant belittling of the plaintiff's position and authority caused the plaintiff bitter humiliation and despair.

(n) During the year 1974, plaintiff and defendant formed a partnership known as the Clinton Partnership, the purpose of which was to purchase property in the Town of Clinton as an investment and ultimately as a growth trust fund for both of the parties' children. The plaintiff and defendant agreed and understood that they would both participate jointly in the decision making process regarding the purchases of property. Without the plaintiff's knowledge or consent, however, the defendant gave a real estate broker permission to enter a bid for a certain piece of property which she ultimately purchased. The plaintiff learned of this purchase at a later date from the broker, again to his embarrassment and humiliation.

(o) In the fall of the year 1974, the plaintiff and defendant were invited to have lunch with one of the trustees of the defendant's trust and with the trustee's assistant. The purpose of the luncheon was to discuss the defendant's request for a disbursement of money from her trust. The defendant at that time was approximately $935,000.00 in debt to the Fiduciary Trust Company. In addition the parties' checking account at that institution was constantly overdrawn. The trustee and his assistant suggested that the plaintiff and defendant might be happier using another bank for their checking and borrowing needs. The trustee and his assistant also commented adversely on the size of the allowances which the defendant was giving to her children. Despite the fact that the plaintiff had during the previous two years attempted to help keep the plaintiff's spending habits within bounds, he nevertheless was greatly embarrassed and humiliated by this meeting since he was made to feel that their comments about the defendant's excessive spending were aimed at him.

(p) In late spring of the year 1975, the plaintiff and defendant decided to open an art gallery which would specialize in conceptual art. The defendant was to be the president of the corporation and the plaintiff was to be the secretary-treasurer. The corporation was to be known as the M. L. D'Arc Gallery, Inc. Through the summer and fall of the year 1975, the parties were involved in lease negotiations for this gallery. The parties had agreed that the plaintiff would be in charge of the business administrative duties and the defendant would be concerned with the aesthetic aspects of the business. Despite the fact that the plaintiff was to be in charge of the financial end of the business, he learned to his dismay that the defendant had agreed to pay her assistant $36,000.00 per year and the secretary $15,600.00 per year. The original budget for the operation of this business was between $12,000.00 and $15,000.00 per month. Because, however, of defendant's arbitrary and unilateral extravagances, the budget was between $25,000.00 and $30,000.00 per month. Plaintiff learned of these arrangements through a third party, this time their accountant who informed him that, based on his knowledge of art galleries, the salaries were unrealistically high.

(q) During the year 1975, the defendant was approached by one the artists who showed his work at the M. L. D'Arc Gallery, Inc. to finance a record which two poets were anxious to produce. The two poets appeared at the residence of the plaintiff and defendant in Far Hills, New Jersey, on a weekend and began to take pictures of the premises. When the plaintiff asked them why they were doing that, they informed him that he and the defendant were financing a record for them. They were surprised that he did not know this. The plaintiff was very embarrassed because the defendant had failed to inform him of her actions.

(r) During the year 1975, the defendant purchased a number of Oriental rugs and certain works of art from a gallery in Maryland. The secretary to the plaintiff and defendant thereafter did some research work on the articles purchased and informed the plaintiff and defendant that the defendant had been overcharged for the items. The plaintiff and defendant thereupon discussed the matter and agreed that there would be no further purchases from this art gallery. The art dealer in question thereafter, however, arranged an appointment with the defendant when the plaintiff was not present, during which appointment he sold the defendant approximately $35,000.00 worth of jewelry and other items. Plaintiff did not learn of this purchase from the defendant. It was the secretary who apologetically informed him. Once again the defendant had agreed with the plaintiff to a given course of action and once again she had undercut and undermined the plaintiff by unilaterally deciding to do otherwise.

(s) In March of the year 1975, the plaintiff invited a prospective partner in a movie production company to accompany the plaintiff and defendant on their spring vacation to St. Maarten Island in the Caribbean. While on this trip, one night after the gambling casino closed, the defendant and the invited friend went bar hopping, without the plaintiff, to local native bars. The evening culminated with the friend, the defendant and one of the local natives swimming nude at a local town beach at dawn.

(t) In August of 1975, the plaintiff and defendant became deeply involved in an attempt to establish a motion picture production company. The operation and management of this company was to be primarily the plaintiff's responsibility. The defendant was to finance the venture with the understanding that if it failed, she would have a tax loss and that if it succeeded, the profits therefrom would belong to the plaintiff. The reason for this arrangement was that the defendant was uncomfortable with the fact that the plaintiff had given up his medical practice and was without substantial income or assets. Several times during the course of the marriage the defendant had offered to give the plaintiff a million dollars in order to rectify this situation. The plaintiff had, of course, refused such offer. It was hoped that through this venture the plaintiff's lack of income and assets would be rectified. From the very outset of the venture, however, the defendant undermined and undercut the plaintiff's authority. She began to spend more and more time with the parties' prospective partners without telling the plaintiff about her activities. If the parties had an appointment with the prospective partners, when plaintiff arrived he would find that the defendant had already been meeting with the prospective partners for several hours prior thereto. She began to spend a great deal of time with the prospective partners without the plaintiff's knowledge. During the course of the negotiations between the prospective partners and the plaintiff and defendant, conflicts arose over the control of the one million dollars which the defendant intended to invest in the production company. The prospective partners wished to make all expenditures of monies subject to a vote among the five principles (that is the three prospective partners, the plaintiff and the defendant) so that the prospective partners would have a three to two vote advantage over the plaintiff and defendant. Plaintiff strongly advised the defendant against this voting arrangement. Plaintiff and defendant's attorneys strongly advised against this voting arrangement. The plaintiff suggested that he and the defendant confer with her personal attorney about this voting arrangement. The defendant became very angry over this suggestion since she sided strongly with the prospective partners. Other problems arose with the prospective partners involving their obligations. Despite the fact that the prospective partners' demands were contrary to the defendant's best interest, she nevertheless sided with the prospective partners, thereby undercutting and belittling the plaintiff's position.

(u) It was during this period of time, while the plaintiff and defendant were attempting to establish the motion picture production company, that defendant became particularly involved with one of the prospective partners. She began to spend an inordinate amount of time alone with this man and actually purchased and paid for the furnishings for a new apartment which he was establishing in a building which was the same building in which the defendant intended to establish her own apartment.

(v) Because of the disagreement involved in the negotiations to set up the motion picture production company and because of the defendant's growing attachment to one of the prospective partners, the defendant informed the plaintiff in February of 1976 that she wished to separate herself from him because she "wanted to do her own thing."

(w) On February 22, 1976, plaintiff and defendant discussed a separation agreement over breakfast in their New York City apartment. The defendant informed the plaintiff that she did not want to be divorced because she did not want to ever remarry. She informed the plaintiff that attorneys were not necessary for the negotiations. The plaintiff and defendant further discussed the agreement as they drove from New York City to their home in Far Hills, New Jersey. At their home in Far Hills the defendant gave to the plaintiff the notes which she had made during their discussion. From these notes the plaintiff typed the agreement. Both parties signed the agreement on that date. A copy of the agreement is attached hereto as Exhibit "A" and made part hereof. Thereafter, during the months of March and April, 1976, the defendant complied with the terms and provisions of the agreement. From and after May, 1976, however, the defendant has refused to comply therewith.

(x) During the early and mid part of the year 1976, the defendant and her now partner in the motion picture production company made several trips together to California. After one of these trips the plaintiff met with the defendant, this man and another party. The defendant's relationship with this man was discussed and the man indicated, in front of the defendant and the other party, that he and the defendant were having an intimate relationship. He stated that they were considering marriage. This was the first knowledge that the plaintiff had that defendant was planning to terminate their marriage. To receive this information in this fashion was totally embarrassing and humiliating to the plaintiff.

6. By reason of said acts of extreme cruelty, the plaintiff's health and safety have become endangered and it is improper and unreasonable to expect plaintiff to continue to cohabit with defendant.

7. More than three months have elapsed since the last act of extreme cruelty complained of as constituting plaintiff's cause of action herein.

8. During the course of the marriage the parties acquired large assets in their joint names. These include the Merriewold West Farm and Annex thereto in Far Hills, New Jersey; property in Bridgewater, New Jersey; a tract of land in Far Hills, New Jersey known as the Far Hills Nursery, Inc.; property in LaCosta, California and the Merriewold West Inc. Art Gallery. These assets are worth approximately two million dollars. The defendant also acquired during the marriage other substantial assets of which the plaintiff has no knowledge.

9. The plaintiff having, during the course of the marriage, withdrawn from his medical practice, is without substantial income and seeks alimony in this cause of action.

10. There have been no previous proceedings between the plaintiff and the defendant respecting the marriage or its dissolution or respecting maintenance of the plaintiff in any court.

WHEREFORE, plaintiff demands judgment on this cause of action:

(A) Dissolving the marriage between the parties.

(B) Compelling the defendant to pay adequate alimony for the plaintiff.

(C) Providing for an equitable distribution of the assets of the parties legally and beneficially acquired during the course of the marriage.

(D) For a reasonable counsel fee and costs.

(E) For such other relief as to which the plaintiff may be entitled.

SECOND CAUSE OF ACTION

1. Plaintiff repeats and realleges the allegations of paragraphs 1, 2 and 3 of the first cause of action as though set forth and repeated at length herein.

2. On February 22, 1976, the plaintiff and defendant entered into an agreement, a copy of which is attached to this complaint as Exhibit "A" and made part hereof. Said agreement is a valid and binding contract.

3. The defendant performed upon said agreement for the months of March and April, 1976, and thereafter has neglected and refused to perform thereunder.

4. The plaintiff seeks specific performance of said agreement.

WHEREFORE, plaintiff demands judgment on this cause of action:

(A) Specifically enforcing the agreement entered into between the parties, dated February 22, 1976.

(B) For a reasonable counsel fee and costs.

RUDD and ACKERMAN
Attorneys for Plaintiff

/s/ Monroe Ackerman

MONROE ACKERMAN
A Member of the Firm

AFFIDAVIT OF VICTOR D'ARC

(Annexed to Foregoing Complaint)

STATE OF NEW JERSEY :
: SS.
COUNTY OF ESSEX :

VICTOR D'ARC, of full age, hereby certifies and deposes:

1. I am the plaintiff in the above entitled action.

2. I have read the within complaint. The allegations thereof are true to the best of my knowledge, information and belief. The said complaint is made in truth and good faith and without collusion, for the cause set forth therein.

I hereby certify on this 24th day of September, 1976, that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Victor D'Arc MD
VICTOR D'ARC

I hereby certify that the foregoing is a true copy of the original on file in my office.

W. Bambrick
Clerk

AGREEMENT DATED FEBRUARY 22, 1976

(Annexed to Foregoing Complaint)

We the undersigned Mary Lea Johnson D'Arc and Victor D'Arc agree to separate and live apart from each other.

We agree to release each other from all claims against each other except for the following conditions:

Mary Lea agrees to give Victor D'Arc a sum which after deducting income taxes will give him tax free alimony of $10,000 per month indefinitely. Victor Agrees to sign a joint tax return.

Victor will not make Mary Lea responsible for any debts nor will Mary Lea make Victor responsible for any debts.

Mary Lea agrees to make all payments that are necessary on any joint property they have. Mary Lea will continue to live in Victor's apartment at 860 United Nations Plaza as long as she makes the necessary payments for maintenance and other assessments.

Whatever property Victor has in his name will remain in his and whatever property Mary Lea has in her name will remain in hers, and whatever property they have in their joint names that property will continue to remain that way.

Mary Lea agrees that in the event that Victor should die she will assume responsibility for the welfare of two daughters Karen Helen D'Arc and Pamela Stephanie D'Arc in that she will give them the sum of $25,000 each per year indefinitely. In addition she agrees to pay all of their educational expenses while they are in school.

Mary Lea acknowledges this to be a fair and just arrangement in recognition of the fact that Victor gave up his professional career and earnings to be able to devote himself to her business interests and that he contributed all of his energies to their marriage and family affairs.

If Victor and Mary Lea should become divorced they agree that this agreement shall be part of the divorce decree.

Victor agrees that if in his lifetime he should acquire sufficient capital in his personal estate to produce the same amount of income then Mary Lea will be released from all financial obligations to him.

Signed February 22, 1976

/s/ Mary Lea Johnson D'Arc

MARY LEA JOHNSON D'ARC

/s/ Victor D'Arc, M.D.

VICTOR D'ARC

ANSWER AND COUNTERCLAIM FILED IN THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION

(Filed March 31, 1977)

The defendant, Mary Lea J. D'Arc, residing at 425 East 58th Street, New York, New York, by way of answer to plaintiff's complaint, says:

FIRST COUNT

1. Defendant admits the allegations of paragraph 1 of the First Count of the complaint.

2. Defendant admits the allegations of paragraph 2 of the First Count of the complaint except that she denies that she has been a resident of the State of New Jersey since November, 1975.

3. She denies the allegations of paragraph 3 of the First Count of the complaint.

4. She admits the allegations of paragraph 4 of the First Count of the complaint.

5. She denies the allegations of paragraphs 5 through 7 inclusive of the First County of the complaint.

6. She admits the allegations of paragraph 7 of the First Count of the complaint insofar as the allegations concern the acquisition of property, but she has no knowledge or information sufficient to form a belief as to the approximate value of said property.

7. She denies the allegations of paragraphs 9 and 10 of the First Count of the complaint.

SECOND COUNT

1. Defendant repeats her answers to the First Count as if set forth at length herein.

2. Except to admit that she signed the document annexed to the complaint as Exhibit "A", she denies the allegations of paragraph 2 of the Second Count of the complaint.

3. Defendant denies the allegations of paragraph 3 of the Second Count of the complaint except to admit that she has refused to perform the asserted contract.

4. Defendant pleads no facts in paragraph 4 requiring a responsive pleading.

FIRST SEPARATE DEFENSE TO BOTH COUNTS

Plaintiff's claims for enforcement of an alleged agreement with his wife, and for alimony and support, equitable distribution, and counsel fees, are all barred by unconscienable and inequitable conduct particularized in the Counterclaim.

SECOND SEPARATE DEFENSE

Plaintiff is barred from any relief in a Court of equity by the doctrine of unclean hands in the specific bases set forth in the Counterclaim.

FIRST SEPARATE DEFENSE TO THE SECOND COUNT

The asserted agreement was obtained by the plaintiff from the defendant by fraud in that plaintiff failed to fully disclose to the defendant wife his plans with reference to her assets and her life as reflected in his arrangement to liquidate her through a paid assassin as detailed in the Counterclaim.

SECOND SEPARATE DEFENSE TO THE SECOND COUNT

Plaintiff is barred from enforcing the alleged agreement set forth in the Second Count by reason of his obtaining defendant's consent thereto without independent counsel and at a time and place making it impossible to obtain independent counsel as to her rights, duties, and obligations and the assets and liabilities of both the parties to said agreement.

THIRD SEPARATE DEFENSE TO THE SECOND COUNT

Plaintiff is barred from enforcing the Second and Third Counts of the complaint because it is neither fair nor equitable in the manner required of such agreements between husband and wife.

COUNTERCLAIM

By way of Counterclaim against the plaintiff, the defendant asserts the following:

FIRST COUNT

DEVIANT SEXUAL CONDUCT

1. Defendant was lawfully married to the plaintiff on July 15, 1972, in New York City.

2. Plaintiff husband was a bona fide resident of the State of New Jersey when this cause of action arose and has ever since and for more than one year next preceding the commencement of this action continued to be a bona fide resident.

3. Plaintiff is presently domiciled at Merriewold West Farm, Far Hills, Somerset County, New Jersey, and defendant is presently domiciled in the City, County and State of New York.

4. There have been no children born of this marriage.

5. Since on or about December 15, 1973, plaintiff has engaged in open, notorious and continuous deviant sexual conduct, without the consent of the plaintiff, to wit, homosexual intercourse with one John Fino in Apartment 15A, at 35 East 83rd Street, New York, New York.

6. During her marriage to plaintiff, defendant acquired with her own funds certain property, some of which were placed in the name of plaintiff or in the joint names of plaintiff and defendant, by reason of his false and fraudulent representation and by reason of the misguided weakness of defendant in indulging the plaintiff, who contributed nothing, material or otherwise, to the marriage between the parties.

7. The aforementioned properties, which may be subject to equitable distribution, include the following among others: Far Hills residence property held in the joint names of both parties, other real property in Far Hills known as the Stable Property and held in the joint names of both parties, real property located in LaCosta, California and Bridgewater Township, New Jersey, real property in Clinton, New Jersey, held in the name of plaintiff and defendant as "Clinton Investment Partners", and other assets of said partnership, stock interests in Merriewold West, Inc., a New Jersey corporation, and Far Hills Nurseries, Inc., a New York corporation, and various other real and personal property held in the names of either or both of the parties.

8. There have been no previous proceedings between the parties respecting this marriage or its dissolution in any Court except an action instituted by the defendant wife presently pending in the Supreme Court of New York, under Index Number 34973/76, which action the defendant wife as plaintiff in New York is undertaking to dismiss voluntarily.

SECOND COUNT
EXTREME CRUELTY

1. Defendant repeats the allegations of the First Count as though set forth at length.

2. The plaintiff has been guilty of extreme cruelty towards the defendant commencing on or about December 15, 1973 and continuing from that day until April 20, 1976. Particularly specifying said acts of extreme cruelty, defendant says:

(A) Since on or about December 15, 1973, plaintiff has engaged in open, notorious and a continuous course of deviant sexual homosexual intercourse with one John Fino in Apartment 15A at 35 East 83rd Street, and plaintiff has on repeated occasions flaunted before defendant this deviant and homosexual relationship with said Fino in a manner designed and calculated to humiliate, embarrass and degrade defendant.

(B) During the last three years plaintiff has refused to engage in any normal sexual intercourse with defendant and in lieu thereof has repeatedly requested that defendant engage in sexual intercourse with various men of plaintiff's choice and in his presence. In furtherance of these requests, plaintiff has repeatedly made known to the defendant the names of those male persons with whom plaintiff desires defendant to engage in sexual relations.

(C) During March and April, 1976, plaintiff endeavored to hire an assassin for the purpose of having defendant murdered, and, in furtherance of his intention to have defendant murdered, as aforesaid, plaintiff offered to pay for the services of such an assassin the sum of $50,000.00 in consideration for the murder, provided it was carried out in such a fashion as to make the murder appear to be mugging.

(D) On numerous occasions during the last two years, plaintiff has falsely characterized defendant to her family and friends as an alcoholic, drug addict and as a person of unsound mental capacity.

(E) On numerous occasions during the past two years, plaintiff has referred to the defendant in vile and degrading terms in the presence of her family and friends of defendant.

3. The above named acts of extreme cruelty endangered the safety and health of the plaintiff and made it improper and unreasonable to expect the defendant to continue to cohabit with the plaintiff.

WHEREFORE, defendant-counterclaimant demands judgment on the First and Second Counts of the Counterclaim:

(a) Dissolving the marriage between the parties;

(b) Equitably distributing all property, both real and personal, which was legally and beneficially acquired by the parties during the marriage by transferring legal and equitable title thereto to the defendant;

(c) Permitting the defendant to resume her former name of Mary Lea Johnson.

THIRD COUNT

1. Defendant repeats the allegations of the First and Second Counts of the Counterclaim as though set forth at length.

2. In addition to the property of the plaintiff in which the defendant has acquired legal interests as set forth above and as to which defendant seeks the return of said legal interests in accordance with this Court's power to achieve equitable distribution, plaintiff has during the course of his marriage wrongfully converted to his own

use other properties of the defendant including the following:

(a) The sum of $50,000.00 converted during 1974 and 1975 and applied by the plaintiff to the purchase of common shares of stock of the Bernards State Bank which are presently issued and outstanding of record in the name of plaintiff.

(b) The sum of $6,000.00 converted by the plaintiff from a bank account at the Peapack-Gladstone Bank in Gladstone, New Jersey on April 29, 1976.

(c) A certificate of deposit in the amount of $50,000.00 in the Bernards State Bank, Bernardsville, New Jersey, converted from Clinton Investment Partners to plaintiff on April 20, 1976.

(d) The sum of $9,000.00 converted by the plaintiff and Clinton Investment Partners by withdrawal from the checking account of said partnership at the Bernards State Bank, Bernardsville, New Jersey.

(e) Certain items of personal property, principally objets d'art, having an approximate value of $97,950.00, converted by plaintiff from defendant on or about April 23, 1976, at which time the same were removed by him from the marital home of the parties and converted to plaintiff's own use.

WHEREFORE, defendant demands judgment against the plaintiff on this Count for an accounting, damages, interest and costs and for such other relief as a Court of equity may deem proper.

FOURTH COUNT

1. Defendant repeats the allegations of the First, Second and Third Counts as though set forth at length.

2. In 1972 plaintiff entered into a contract for the purchase of certain stock and a proprietary lease for a cooperative apartment at 860 United Nations Plaza, New York, New York, and for the marital home of plaintiff and defendant.

3. Prior to the execution of said contract and purchase, plaintiff complained to defendant that he was financially unable to purchase said apartment and his alleged financial inability was a source of discord and disharmony with respect to the marriage.

4. Thereafter, in an effort to quiet the aforesaid discord and disharmony with respect to the marriage, defendant personally guaranteed a loan to plaintiff, the proceeds of which loan were used by plaintiff to purchase the aforesaid apartment, and title to the shares of stock and proprietary lease representing ownership of said cooperative apartment was transferred to plaintiff. Defendant thereafter re-paid in full the loan of the plaintiff, and defendant further paid all of the considerations for the transfer to the plaintiff of the shares of stock and proprietary lease representing ownership of said cooperative apartment.

5. At the time of the transfer of said cooperative apartment, plaintiff agreed to hold such shares of stock and proprietary lease in trust for defendant, and to convey his interest therein on demand to defendant.

6. In or about March, 1977, plaintiff sold the aforementioned cooperative apartment and converted the proceeds of said sale to his own use, which amount is approximately $150,000.00.

WHEREFORE, defendant demands judgment on this Count for an accounting for the proceeds of the aforementioned sale and for such other relief as may be proper in the circumstances including interest and costs.

FIFTH COUNT

1. On July 15, 1972, a form of ceremony of marriage took place between the parties to this action in the City of New York.

2. Plaintiff was a bona fide resident of the State of New Jersey at the commencement of this action and has continued to be such a bona fide resident.

3. The plaintiff resides at Merriewold West Farm, Far Hills, New Jersey, and the defendant at the address set forth at the head of this pleading.

4. Prior to the marriage of the parties, the plaintiff represented to the defendant that on and after their marriage he would perform and discharge his marital obligations to defendant including engaging in conjugal relations with defendant as her husband.

5. Defendant at the time of contracting the marriage with the plaintiff believed the aforesaid representations and relied upon said representations in entering into the alleged contract of marriage.

6. The aforesaid representations of plaintiff to defendant were false and fraudulent and were made to deceive defendant in that both subsequent and prior to the marriage, plaintiff was and has been a homosexual and did not intend to engage in normal conjugal relations with defendant during the course of their marriage.

7. In or about December, 1973, defendant discovered that the aforementioned representations of the plaintiff were false, and defendant has not ratifed the marriage since learning of the false representations set forth above.

8. No children have been born of the alleged marriage between the plaintiff and defendant.

9. Defendant repeats the allegations of the following paragraphs of the Counts set forth above: paragraph 7 of the First Count, paragraph 2 of the Third Count and paragraph 6 of the Fourth Count.

WHEREFORE, plaintiff demands judgment on this Count:

(a) Declaring and adjudging the alleged marriage between the parties to be null and void;

(b) Directing, under the general equity powers of this Court, the return to the defendant of any and all properties, real, personal or mixed, wheresoever situated or located, in which plaintiff has obtained any equitable or legal interest in any manner or way or form by way or by reason of his relationship with the defendant;

(c) For an accounting, damages, interest and costs, and for such other relief as may be proper in the circumstances.

We certify that the within Answer and Counterclaim have been filed and served upon adverse counsel in the manner required by R.1:5-2 and within the time permitted by R.4:6-1.

Wharton, Stewart & Davis

By /s/ Richard H. Thiele, Jr.

RICHARD H. THIELE, JR.

The Partner Acting
for the Firm
Attorneys for Defendant-
Counterclaimant

Dated: March 30, 1977

Note: (1) No affidavit of verification and non-collusion is filed in connection with this Counterclaim pursuant to the requirement of R.4:77-2, by reason of the present absence of defendant-counterclaimant, who is out of the country.

(2) Such an affidavit will be filed and served forthwith upon her availability.

(3) The allegations of the counterclaim are in fact predicated upon defendant's verified pleadings heretofore filed in New York proceedings referred to in the counterclaim, copies of which have also been filed in this proceedings.

Wharton, Stewart & Davis

By /s/ Richard H. Thiele, Jr.

RICHARD H. THIELE, JR.

The Partner Acting
for the Firm
Attorneys for Defendant-
Counterclaimant

SUPPLEMENT TO COMPLAINT

(Filed May 4, 1977)

Plaintiff, VICTOR D'ARC, by way of supplement to his complaint, says as follows:

1. Plaintiff supplements the first cause of action of his complaint by adding to paragraph 5 thereof an additional specific act of extreme cruelty:

(y) In May of the year 1976, the defendant while still married to the plaintiff was presented with a $14,500.00 diamond engagement ring by the gentleman mentioned in subparagraph "x" of the complaint. The defendant had during the period while plaintiff and defendant were still living together, purchased items of furniture and furnishings for this man and had paid for them. She also during that period of time used this man's telephone number as her home telephone.

THIRD CAUSE OF ACTION

1. Plaintiff repeats and realleges paragraphs 1, 2, 3, 4, 8, 9 and 10 of the first cause of action and incorporates them herein as though set forth at length.

2. The defendant committed adultery with one John Fino who resides at 416 Turneur, Bronx, New York, in the spring of the year 1974 at the marital home of the plaintiff and defendant known as Merriewold West Farm, Far Hills, New Jersey, and continuing thereafter for many months both in the marital home of the plaintiff and the defendant in Far Hills and an apartment owned by the plaintiff and used by the plaintiff and defendant at 860 United Nations Plaza, New York, New York. The acts of sexual relations in the New York apartment occurred in February of 1975. Further acts of adultery between the defendant and said John Fino occured on the island of St. Maarten at the Mullet Bay Hotel during the spring of the year 1975.

WHEREFORE, plaintiff demands judgment on this cause of action:

(A) Dissolving the marriage between the parties.

(B) Compelling the defendant to pay adequate alimony for the plaintiff.

(C) Providing for an equitable distribution of the assets of the parties legally and beneficially acquired during the course of the marriage.

(D) For a reasonable counsel fee and costs.

(E) For such other relief as to which the plaintiff may be entitled.

RUDD and ACKERMAN
Attorneys for Plaintiff

By: /s/ Monroe Ackerman

MONROE ACKERMAN
A Member of the Firm.

AFFIDAVIT OF VICTOR D'ARC

(Annexed to Foregoing Complaint)

STATE OF NEW JERSEY :
: SS.
COUNTY OF ESSEX :

VICTOR D'ARC, of full age, hereby certifies and deposes:

1. I am the plaintiff in the above entitled action.

2. I have read the within supplement to complaint. The allegations thereof are true to the best of my knowledge, information and belief. The said supplement to complaint is made in truth and good faith and without collusion, for the cause set forth therein.

I hereby certify on this 20th day of April, 1977, that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Victor D'Arc MD

VICTOR D'ARC

PLAINTIFF'S REPLY TO ANSWER AND ANSWER TO COUNTERCLAIM.

(Filed April 25, 1977)

Plaintiff, VICTOR D'ARC, by way of reply to the separate defenses set forth in the defendant's answer, says as follows:

1. Plaintiff denies the allegations of the first separate defense to both counts.

2. Plaintiff denies the allegations of the second separate defense.

3. Plaintiff denies the allegations of the first separate defense to the second count.

4. Plaintiff denies the allegations of the second separate defense to the second count.

5. Plaintiff denies the allegations of the third separate defense to the second count.

ANSWER TO COUNTERCLAIM

Plaintiff, VICTOR D'ARC, by way of answer to the defendant's counterclaim, says as follows:

FIRST COUNT

1. Plaintiff admits the allegations of paragraph 1.

2. Plaintiff admits the allegations of paragraph 2.

3. Plaintiff admits so much of paragraph 3 as states that his domicile is Merriewold West Farm, Far Hills, Somerset County, New Jersey. He denies that the defendant is presently domiciled in the City, County and State of New York. Defendant is domiciled at the Merriewold West Farm, Far Hills, Somerset County, New Jersey, is in possession and control of said domicile and, through the use of armed guards and police harassment,

has attempted to exclude the plaintiff from the use, occupation and enjoyment of said domicile.

4. Plaintiff admits the allegations of paragraph 4.

5. Plaintiff denies the allegations of paragraph 5.

6. Plaintiff denies the allegations of paragraph 6 except to state that the defendant did purchase with her own funds an interest in a partnership known as the Clinton Investment Partners, and except that plaintiff has no knowledge or information as to assets which the defendant may have acquired for herself during the marriage with her own funds.

7. Plaintiff admits so much of paragraph 7 as lists the assets acquired during the marriage in the joint names of the parties. Plaintiff adds to the list of assets so purchased two movie properties, one entitled "Fort Apache in the Bronx" and the other entitled "Hart Crane." As to whether said properties are subject to equitable distribution, the plaintiff leaves the defendant to her proof.

8. Plaintiff admits the allegations of paragraph 8 and states that, in addition thereto, the defendant also instituted litigation in the Supreme Court of the State of New York in two additional suits, having index numbers 2517/77 and 2518/77.

WHEREFORE, plaintiff demands judgment dismissing the first count of the defendant's counterclaim.

SECOND COUNT

1. Plaintiff repeats and realleges his answers to the allegations of the first count as though set forth herein at length.

2. Plaintiff denies the allegations of paragraph 2 and particularly responds to the sub-paragraphs thereof as follows:

(A) Plaintiff denies the allegations of sub-paragraph (A).

(B) Plaintiff denies the allegations of sub-paragraph (B).

(C) Plaintiff denies the allegations of sub-paragraph (C).

(D) Plaintiff denies the allegations of sub-paragraph (D), except he states that on numerous occasions the plaintiff and defendant discussed the fact that her sons, Seward and Rodney, both of whom had histories of drug use and possession and both of whom had been convicted of the possession of drugs and both of whom for some period of time had been on probation from said convictions, were drug addicts.

(E) Plaintiff denies the allegations of sub-paragraph (E).

3. Plaintiff denies the allegation of paragraph 3.

WHEREFORE, plaintiff demands judgment dismissing the second count of the defendant's counterclaim.

THIRD COUNT

1. Plaintiff repeats and realleges his answers to the first and second counts as though set forth herein at length.

2. Plaintiff denies so much of paragraph 2 as states that he wrongfully converted to hsi own use properties of the defendant. To the remaining statements set forth in paragraph 2, plaintiff makes no answer since no facts are set forth requiring such answer. As to the sub-paragraphs thereunder, plaintiff says as follows:

(a) Plaintiff denies so much of sub-paragraph (a) as states that he converted $50,000.00 and he states that he did purchase $50,000.00 value of common shares of stock of the Bernard State Bank, at the urging and with the consent and knowledge of the defendant. Said shares are presently issued and outstanding in his name.

(b) Plaintiff denies the allegations of sub-paragraph (b), except to state that he did withdraw the sum of $6,000.00 from a joint bank account owned by the plaintiff and the defendant at the Peapack Gladstone Bank on April 29, 1976, after the defendant defaulted in the payment required by the agreement between the parties, dated February 22, 1976.

(c) Plaintiff denies the allegations of sub-paragraph (c) and states that said $50,000.00 is on deposit with the Chase Manhattan Bank in the name of Clinton Investment Partners with Victor D'Arc as agent.

(d) Plaintiff denies the allegations of sub-paragraph (d), except to state that he did withdraw $9,000.00 from the partnership known as Clinton Investment Partners, of which partnership he and the defendant are the sole partners, after the defendant defaulted in the payment required by the agreement between the parties, dated February 22, 1976.

(e) Plaintiff denies the allegations of sub-paragraph (e), except that he does state that he has in his possession objets d'art belonging to the corporation known as Merriewold West, Inc., a corporation of which he and the defendant are the sole stockholders, with an approximate value of $98,000.00. Plaintiff further states that the defendant has in her possession furniture, furnishings, paintings, antiques and objets d'art belonging in said corporation in the approximate amount of $500,000.00

FOURTH COUNT

1. Plaintiff repeats and realleges his answers to the first, second and third counts as though set forth herein at length.

2. Plaintiff denies the allegations of paragraphs 2, 3, 4 and 5 and states that in the year 1972, prior to the marriage between the parties, the plaintiff entered into a contract to acquire a co-operative apartment at 860 United Nations Plaza, New York, New York. The plaintiff, not having the funds to acquire said premises, borrowed said funds from the Chase Manhattan Bank, New York, New York. The defendant put up as security certain certificates of deposit which she owned. At the time the defendant placed said certificates of deposit as security, she was fully aware that the plaintiff did not have the funds to acquire said premises or to pay the loan which he obtained. She, nevertheless, urged him to enter into the purchase agreement and to obtain the loan, knowing and intending that after their marriage she would repay the Chase Manhattan Bank. The defendant repaid the loan and informed the plaintiff, to his surprise, that she was making a wedding gift to the plaintiff of the amount borrowed. There was no disharmony between the plaintiff and the defendant during the course of the marriage with regard to the fact that the defendant is an enormously wealthy woman and the plaintiff was at the time of the marriage a practicing psychiatrist, except that the defendant did during the course of the marriage feel uncomfortable because of the discrepancy in their assets and income and, in fact, on several occasions during the course of the marriage, the defendant offered to give the plaintiff a million dollars in order to lessen this discrepancy. The plaintiff had, of course, refused such offers.

3. Plaintiff admits so much of paragraph 6 as states that in March, 1977, he sold said co-operative apartment for the sum of $150,000.00.

WHEREFORE, plaintiff demands judgment dismissing the fourth count of the defendant's counterclaim.

FIFTH COUNT

1. Plaintiff admits so much of paragraph 1 as states that the parties were married on July 15, 1972, in the City of New York. He denies all other allegations of said paragraph.

2. Plaintiff admits the allegations of paragraph 2.

3. Plaintiff denies the allegations of paragraph 3, except he states that his domicile is Merriewold West Farm, Far Hills, Ne Jersey. He further states that the defendant's domicile is also Merriewold West Farm, Far Hills, New Jersey. Plaintiff further states that the defendant is presently in occupancy and control of the Merriewold West Farm and has wrongfully and improperly excluded him from the use and occupation thereof by the use of armed guards and police harassment.

4. In answer to the allegations of paragraphs 4 and 5, the plaintiff states that he did perform and discharge all of his obligations, including engaging in conjugal relations with the defendant. He continued to discharge these obligations until the defendant, by virtue of the extreme cruelty set forth in the first cause of action of his complaint and the third cause of action set forth in his supplement to complaint, made it impossible for him to continue to discharge these functions. It was, in fact, the defendant who failed in her obligation under the marriage vows. Shortly after the parties were married, the defendant began a course of conduct which over the remainder of the marriage became, with increasing force, abhorrent and foreign to the plaintiff. Shortly after the marriage, the defendant informed the plaintiff that she desired to become involved in a course of deviant sexual

conduct which the plaintiff considered destructive to the marriage. This conduct consisted of indicating to the plaintiff that she wished to include in their sexual life third persons, both male and female, and that she wished to engage in lesbian relationships, both in the presence of the plaintiff and outside of his presence. She went so far as to request that the plaintiff arrange for and obtain these diverse and bizarre sexual experiences for her, all of which the plaintiff refused to do. Defendant further insisted that she and the plaintiff attend as spectators various establishments wherein sex shows were performed, including lesbian activity and transvestite activity. The plaintiff objected to this type of entertainment and informed the defendant that he believed it to be degrading and beneath their dignity. The defendant, however, over the course of the marriage made known to the plaintiff that, because of the history of her family and of her upbringing, she felt the aforementioned activity and sexual relationships were both necessary for her and were consonant with her background and upbringing. It was these facts above recited in conjunction with the facts set forth in the plaintiff's complaint and supplement to complaint which eventually destroyed this marriage.

5. Plaintiff denies the allegations of paragraph 6.

6. Plaintiff denies the allegations of paragraph 7 and states that the parties continued to have sexual relations until approximately December of the year 1975.

7. Plaintiff admits the allegations of paragraph 8.

8. Plaintiff repeats and realleges his answers to the allegations of the following paragraphs of the counts set forth above: paragraph 7 of the first count, paragraph 2 of the third count and paragraph 6 of the fourth count.

WHEREFORE, plaintiff demands judgment dismissing the fifth count of the defendant's counterclaim.

FIRST SEPARATE DEFENSE

Plaintiff reserves the right to move to strike the entire counterclaim on the basis that said counterclaim is not verified as specifically required by Rule 4:72-2.

RUDD and ACKERMAN
Attorneys for Plaintiff

By: Monroe Ackerman

MONROE ACKERMAN

A Member of the Firm.

AMENDED ANSWER AND COUNTERCLAIM

(Filed July 11, 1977)

The defendant, Mary Lea J. D'Arc, residing at 425 East 58th Street, New York, New York, by way of answer to plaintiff's complaint and supplement to complaint, says:

FIRST COUNT

1. Defendant admits the allegations of paragraph 1 of the First Count of the complaint.

2. Defendant admits the allegations of paragraph 2 of the First Count of the complaint that she denies that she has been a resident of the State of New Jersey since November, 1975.

3. Defendant denies the allegations of paragraph 3 of the First Count of the complaint.

4. Defendant admits the allegations of paragraph 4 of the First Count of the complaint.

5. Defendant denies the allegations of paragraph 5 of the First Count of the complaint.

6. Defendant admits the allegations of paragraph 5(a) of the First Count of the complaint insofar as it is alleged that the plaintiff is a psychiatrist and that the defendant has a substantial trust fund and annual income. Defendant has no knowledge and leaves plaintiff to his proof as to his yearly income. The defendant denies the allegation that by mutual agreement between the parties, that the plaintiff withdrew from his medical practice to participate in the management of the defendant's assets. The defendant in fact encouraged the plaintiff to remain in his full-time psychiatric practice. The defendant denies the allegation that there was an understanding and

agreement between the parties regarding plaintiff's withdrawal from his practice of medicine and denies any agreement between the plaintiff and defendant to have plaintiff act in partnership in the management of her financial affairs.

7. The defendant denies the allegations of paragraph 5(b) of the First Count of the complaint.

8. The defendant denies the allegations of paragraph 5(c) of the First Count of the complaint insofar as they allege that defendant children were charged with the alleged offense of dealing in narcotic drugs. The defendant denies the allegation that there was an agreement between the parties to exclude certain friends of defendant's children from the parties' home.

9. The defendant denies the allegations of paragraph 5(d) of the plaintiff's First Count of the complaint and alleges that her son, Roderick, did request the purchase of a tractor in 1972 to participate in a farming operation. Her son had been involved in farming from various residences all his life and did purchase a specific tractor. Defendant has no knowledge regarding plaintiff's allegation that the tractor was too large for the intended purpose.

10. Defendant admits the allegation of paragraph 5(e) of the First Count of the complaint regarding the allegation that defendant's son, Roderick, did not get along with the plaintiff. The defendant denies the allegation that Roderick administered any narcotic drug to the parties' dog in 1973. Defendant admits that defendant's son, Roderick, left the marital home only because of plaintiff's severe pressure upon her.

11. Defendant admits the allegations of paragraph 5(f) of the First Count of the complaint regarding the fact that defendant's sons, Roderick and Seward, were

charged with drug possession in 1972. The defendant denies the allegation of her refusal to discipline the children and indicates that she did in fact reprimand them severely. It was through the efforts of the defendant, and not the plaintiff, that her son, Seward, was hospitalized. The defendant denies the allegation that her son, Seward, devised a plan to blow up the Far Hill Police Station. Her son's allowance was in fact reduced because of outside income and the fact that he became employed—not by reason of plaintiff's advice.

12. The defendant denies the allegations that the plaintiff had anything to do with either the pre-purchase discussion of the ultimate purchase of an automobile by defendant's son.

13. Defendant admits the allegations of paragraph 5(h) regarding the fact that plaintiff's son, Quentin, came to live with the parties in 1974. The defendant denies the allegations that she was not concerned with the welfare of her children. Defendant admits that the plaintiff made arrangements for the boy's schooling in New York City because of his medical practice in the area and his contacts with school administration officials. She denies the allegation that plaintiff had anything at all to do with obtaining tutors for her son. Defendant admits that plaintiff made arrangements for the boy's summer schooling but denies that it was only through his efforts that her son was enrolled in the Lawrenceville School. The defendant admits the allegation regarding her son's dismissal from Choate School, but again denies it was through plaintiff's efforts that he was enrolled in Lawrenceville School. Defendant admits that her son left Lawrenceville School and was admitted for treatment to Pennsylvania Hospital, Philadelphia, Pennsylvania. The defendant denies the allegation that she never inquired as to the welfare of her son and that there was only one communication from her to treating physician.

14. Defendant admits the allegation of paragraph 5(i) of the First Count of the complaint insofar as it alleges that there were discussions regarding her children's allowances. Defendant denies there was any agreement regarding the children's allowances and that it was the wife's decision regarding any reduction. She denies that she asked the plaintiff to advise her regarding her children's income and denies any allegation that the plaintiff was used by defendant to do "dirty work" with her children.

15. The defendant admits the allegations of paragraph 5(j) of the First Count of the complaint regarding the fact that one Clendenon Ryan approached the parties regarding local government activities. The defendant denies the allegation that there was an agreement between the parties that the plaintiff would accept a position on the local planning board if offered. Defendant denies that the plaintiff was caused any great embarrassment or that she acknowledges any wrongdoing in connection with this asserted grievance.

16. Defendant admits the allegation of paragraph 5(k) of the First Count of the complaint except that she denies that she did not tell the plaintiff of her intended contribution to the organization for which the plaintiff served as a trustee.

17. Defendant admits the allegations of paragraph 5(l) of the First Count of the complaint regarding her interest in the development of an art gallery. Defendant denies the allegation that she sought plaintiff's advice on this venture but admits that she invested $30,000 initially and made subsequent investments. The defendant denies any over-reaching on the part of any art dealer and leaves the plaintiff to his proofs as to the manner in which any art dealer mistreated him.

18. The defendant denies the allegation of paragraph 5(m) of the First Count of the complaint that the plaintiff and defendant formed a corporation in 1974. The defendant admits the allegations regarding the budgeting of an art show and that it was plaintiff's responsibility to keep the show within its budgetary limits. The defendant denies that she incurred any additional expenses and alleges that it was in fact the plaintiff who over-ran the budget and spent over $100,000. Defendant admits the allegation regarding the building display on the parties' property, but this was done with plaintiff's complete knowledge. The defendant denies the allegation regarding any humiliation or belittlement to plaintiff because of her unilateral decision making.

19. The defendant admits the allegations of paragraph 5(n) of the First Count of the complaint regarding the formation of a partnership but denies that it was for the purpose of creating a trust fund for both of the parties' children. There was no such agreement and the defendant denies a decision regarding joint participation in the purchase of property by the partnership. Plaintiff was only a nominal partner in this venture as the business was funded entirely with her personal funds. Defendant denies any embarrassment or humiliation to plaintiff based on her actions as the real partner in interest in this business venture.

20. The defendant admits the allegations of paragraph 5(o) of the First Count of the complaint regarding a meeting being held in the fall of 1974. Defendant denies plaintiff's allegation that he was invited to the lunch meeting and in fact he was merely accompanying her. The switch in defendant's checking account at the Fiduciary Trust Company was a recommendation made due to a possible conflict of interest as this financial institution was also acting as a trustee for defendant's per-

sonal trust fund. Defendant denies the allegation of adverse comments to plaintiff regarding the use of her money and denies that any embarrassment or humiliation of the plaintiff during or as a result of this meeting.

21. Defendant denies the allegations of paragraph 5(p) of the First Count of the complaint alleging any mutual decision between the parties to open an art gallery. The decision was solely that of defendant who was the sole shareholder in the corporation. The defendant was made secretary-treasurer as alleged. Defendant denies the further allegation that plaintiff was to be in charge of the financial end of the business and has no knowledge of plaintiff's acquiring knowledge through any third party regarding the expenses of this venture and leaves the plaintiff to his proofs regarding this allegation.

22. Defendant admits the allegation contained in paragraph 5(q) of the First Count of the complaint but denies that plaintiff had no knowledge and specifically alleges that he did have total knowledge of this entire matter through the defendant.

23. Defendant admits the allegations contained in paragraph 5(r) of the First Count of the complaint regarding the purchase of rugs and works of art in 1975 but alleges that it was from a gallery in Delaware and not Maryland. Defendant denies that she was overcharged for these items or that there was any agreement not to make further purchases from this art dealer. Defendant admits a subsequent purchase of jewelry from the art dealer in question.

24. The defendant admits the allegations of paragraph 5(s) of the First Count of the complaint.

25. The defendant admits the allegations of paragraph 5(t) of the First Count of the complaint regarding the establishment of a motion picture production company.

The defendant denies the allegation that the operation of this venture was to be the plaintiff's responsibility and alleges that there were five partners involved, not merely the plaintiff and defendant. The defendant admits that it was her money that was to be used to finance the venture but denies any agreement regarding profits to be given to the plaintiff. The defendant denies any agreement regarding an offer to the plaintiff of a million dollars for his giving up his medical practice. As previously indicated, the defendant urged the plaintiff to maintain his psychiatric practice. Defendant further denies the allegation that the business was run without the plaintiff's knowledge or that any appointment was ever held without the plaintiff's knowledge or his being present. Defendant admits the allegation regarding the conflict over control of the production company's money but denies that her alleged siding with other prospective partners belittle or undercut the plaintiff's position.

26. The defendant admits the allegations of paragraph 5(u) of the First Count of the complaint but indicates that these activities in April, 1976 were subsequent to the separation of plaintiff and defendant.

27. Defendant denies the allegations of paragraph 5(v) of the First Count of the complaint and indicates that it was the plaintiff's desire to separate from the defendant. She acquiesced because she no longer wished to live with the plaintiff because of his homosexual relations with John Fino and because of the conflicts regarding her business activities.

28. The defendant admits the allegations of paragraph 5(w) of the First Count of the complaint regarding the discussion between the parties about a separation agreement. Defendant advised the plaintiff that she would provide an income for him and discussed a fair amount and the proposed distribution of the joint properties of

the parties. This discussion initially took place during the car ride from New York City to the parties' home in Far Hills, New Jersey. The defendant denies the preparation of any notes made during this trip since it was necessary for the defendant to drive the automobile when plaintiff could no longer do so because he had broken down in tears during the discussion. Defendant admits that she signed a document prepared solely by the plaintiff. Subsequent payments to the plaintiff were made on March 1 and March 26, 1976 in the amount of $10,000 each.

29. The defendant admits the allegation of paragraph 5(x) of the First Count of the complaint in that she did travel to California on or about February 14, 1976 with a partner in the motion production company. Defendant denies any statement was made to the plaintiff regarding an intimate relationship with this partner. Defendant denies the statement to the plaintiff regarding an impending marriage and denies any embarrassment or humiliation to the plaintiff since he had previously admitted a homosexual love affair with one John Fino, which was one of the causes of the separation between the parties.

30. Except to admit the receipt of a diamond ring, defendant denies the allegations of paragraph 5(y) of the First Count of the complaint.

SECOND COUNT

1. Defendant repeats her answers to the First Count as if set forth at length herein.

2. Except to admit that she signed the document annexed to the complaint as Exhibit "A", she denies the allegations of paragraph 2 of the Second Count of the complaint.

3. Defendant denies the allegations of paragraph 3 of the Second Count of the complaint except to admit that she has refused to perform the asserted contract.

4. No facts are pleaded in paragraph 4 requiring a responsive pleading.

THIRD COUNT

1. Defendant repeats her answers to the First and Second Count of the complaint as if fully set forth at length herein.

2. The defendant denies the allegations of paragraph 2 of the Third Count of the complaint regarding the commission of adultery with one John Fino in the spring of 1974 at the marital home of the plaintiff and defendant in Far Hills, New Jersey. Defendant denies any adulterous relationship with John Fino in New York and any such relationship on the island of St. Marten in the spring of 1975.

FIRST SEPARATE DEFENSE TO BOTH COUNTS

Plaintiff's claims for enforcement of an alleged agreement with his wife, and for alimony and support, equitable distribution, and counsel fees, are all barred by unconscienable and inequitable conduct particularized in the Counterclaim.

SECOND SEPARATE DEFENSE

Plaintiff is barred from any relief in a Court of equity by the doctrine of unclean hands in the specific bases set forth in the Counterclaim.

FIRST SEPARATE DEFENSE TO THE SECOND COUNT

The asserted agreement was obtained by the plaintiff from the defendant by fraud in that plaintiff failed to fully disclose to defendant wife his plans with reference to her assets and her life as reflected in his arrangement to liquidate her through a paid assassin as detailed in the Counterclaim.

SECOND SEPARATE DEFENSE TO THE SECOND COUNT

Plaintiff is barred from enforcing the alleged agreement set forth in the Second Count by reason of his obtaining defendant's consent thereto without independent counsel and at a time and place making it impossible to obtain independent counsel as to her rights, duties, and obligations and the assets and liabilities of both the parties to said agreement.

THIRD SEPARATE DEFENSE TO THE SECOND COUNT

Plaintiff is barred from enforcing the Second and Third Counts of the complaint because it is neither fair nor equitable in the manner required of such agreements between husband and wife.

COUNTERCLAIM

By way of counterclaim against the plaintiff, the defendant asserts the following:

FIRST COUNT
DEVIANT SEXUAL CONDUCT

1. Defendant was lawfully married to the plaintiff on July 15, 1972, in New York City.

2. Plaintiff husband was a bona fide resident of the State of New Jersey when this cause of action arose and has ever since and for more than one year next preceding the commencement of this action continued to be a bona fide resident.

3. Plaintiff is presently domiciled at Merriewold West Farm, Far Hills, Somerset County, New Jersey, and defendant is presently domiciled in the City, County and State of New York.

4. There have been no children of this marriage.

5. Since on or about December 15, 1973, plaintiff has engaged in open, notorious and continuous deviant sexual conduct, without the consent of the defendant, to wit, homosexual intercourse with one John Fino in Apartment 15A, at 35 East 83rd Street, New York, New York.

6. During her marriage to plaintiff, defendant acquired with her own funds certain property, some of which were placed in the name of plaintiff or in the joint names of plaintiff and defendant, by reason of his false and fraudulent representation and by reason of the misguided weakness of defendant in indulging the plaintiff, who contributed nothing material or otherwise to the marriage between the parties.

7. The aforementioned properties, which may be subject to equitable distribution, include the following among others: Far Hills residence property held in the joint names of both parties, other real property in Far Hills known as the stable Property and held in the joint names of both parties, real property located in LaCosta, California and Bridgewater Township, New Jersey, real property in Clinton, New Jersey, held in the name of plaintiff and defendant as "Clinton Investment Partners", and other assets of said partnership, stock interests in Merriewold West, Inc., a New Jersey corporation, and Far Hills Nurseries, Inc., a New York corporation, and various other real and personal property held in the names of either or both of the parties or otherwise.

8. There have been no previous proceedings between the parties respecting this marriage or its dissolu-

tion in any Court except an action instituted by the defendant wife presently pending in the Supreme Court of New York, under Index Number 34973/76, which action has been dismissed without prejudice.

SECOND COUNT
EXTREME CRUELTY

1. Defendant repeats the allegations of the First Count as through set forth at length.

2. The plaintiff has been guilty of extreme cruelty towards the defendant commencing on or about December 15, 1973, and continuing from that day until April 20, 1976. Particularly specifying said acts of extreme cruelty, defendant says:

(a) Since on or about December 15, 1973, plaintiff has engaged in open, notorious and a continuous course of deviant sexual homosexual intercourse with one John Fino in Apartment 15A at 35 East 83rd Street, and plaintiff has on repeated occasions flaunted before defendant this deviant and homosexual relationship with said Fino in a manner designed and calculated to humiliate, embarrass and degrade defendant.

(b) During the last three years plaintiff has refused to engage in any normal sexual intercourse with defendant and in lieu thereof has repeatedly requested that defendant engage in sexual intercourse with various men of plaintiff's choice and in his presence. In furtherance of these requests, plaintiff has repeatedly made known to the defendant the names of those male persons with whom plaintiff desires defendant to engage in sexual relations.

(c) During March and April, 1976, plaintiff endeavored to hire an assassin for the purpose of having defendant murdered, as aforesaid, plaintiff offered to pay for the services of such an assassin the sum of $50,000 in consideration for the murder, provided it was carried out in such a fashion as to make the murder appear to be a mugging.

(d) On numerous occasions during the last two years, plaintiff has falsely characterized defendant to her family and friends as an alcoholic, drug addict and as a person of unsound mental capacity.

(e) On numerous occasions during the past two years plaintiff has referred to the defendant in vile and degrading terms in the presence of her hamily and friends of defendant.

3. The above named acts of extreme cruelty endangered the safety and health of the plaintiff and made it improper and unreasonable to expect the defendant to continue to cohabit with the plaintiff.

WHEREFORE, defendant-counterclaimant demands judgment in the First and Second Counts of the counterclaim:

(a) Dissolving the marriage between the parties;

(b) Equitably distributing all property, both real and personal, which was legally and beneficially acquired by the parties during the marriage, by transferring legal and equitable title thereto to the defendant;

(c) Permitting the defendant to resume her former maiden name of Mary Lea Johnson.

THIRD COUNT

1. Defendant repeats the allegations of the First and Second Counts of the counterclaim as though set forth at length.

2. In addition to the property of the plaintiff in which the defendant has acquired legal interests as set forth above and as to which defendant seeks the return of said legal interests in accordance with this Court's power to achieve equitable distribution, plaintiff has during the course of his marriage wrongfully converted to his own use other properties of the defendant including the following:

(a) The sum of $50,000 converted during 1974 and 1975 and applied by the plaintiff to the purchase of common shares of stock of the Bernards State Bank which are presently issued and outstanding of record in the name of plaintiff.

(b) The sum of $6,000 converted by the plaintiff from a bank account at the Peapack-Gladstone Bank in Gladstone, New Jersey on April 29, 1976.

(c) A certificate of deposit in the amount of $50,000 in the Bernards State Bank, Bernardsville, New Jersey, converted from Clinton Investment Partners to plaintiff on April 20, 1976.

(d) The sum of $9,000 converted by the plaintiff and Clinton Investment Partners by withdrawal from the checking account of said partnership at the Bernards State Bank, Bernardsville, New Jersey.

(e) Certain items of personal property, principally objets d'art, having an approximate value of $97,950.00 converted by plaintiff from defendant on or about April 23, 1976, at which time the same were removed by him from the marital home of the parties and converted to plaintiff's own use.

WHEREFORE, defendant demands judgment against the plaintiff on this Count for an accounting, damages, interest and costs and for such other relief as a Court of equity may deem proper.

FOURTH COUNT

1. Defendant repeats the allegations of the First, Second, and Third Counts as though set forth at length.

2. In 1972 plaintiff entered into a contract for the purchase of certain stock and a proprietary lease for a cooperative apartment at 860 United Nations Plaza, New York, New York, and for the marital home of plaintiff and defendant.

3. Prior to the execution of said contract and purchase, plaintiff complained to defendant that he was financially unable to purchase said apartment and his alleged financial inability was a source of discord and disharmony with respect to the marriage.

4. Thereafter, in an effort to quiet the aforesaid discord and disharmony with respect to the marriage, defendant personally guaranteed a loan to plaintiff, the proceeds of which loan were used by plaintiff to purchase the aforesaid apartment, and title to the shares of stock and proprietary lease representing ownership of said cooperative apartment was transferred to plaintiff. Defendant thereafter re-paid in full the loan of the plaintiff, and defendant further paid all of the consideration for the transfer to the plaintiff of the shares of stock and proprietary lease representing ownership of said cooperative apartment.

5. At the time of the transfer of said shares of stock and proprietary lease representing ownership of said cooperative apartment, plaintiff agreed to hold such shares of stock and proprietary lease in trust for defend-

ant, and to convey his interest therein on demand to defendant.

6. In or about March, 1977, plaintiff sold the aforementioned cooperative apartment and converted the proceeds of said sale to his own use, which amount is approximately $150,000.

WHEREFORE, defendant demands judgment on this Count for an accounting of the proceeds of the aforementioned sale and for such other relief as may be proper in the circumstances including interest and costs.

We certify that the within Amended Answer and Counterclaim have been filed and served upon adverse counsel in the manner required by R.1:5-2 and within the time permited by R.4:6-1 as extended by order of this Court.

Wharton, Stewart & Davis

By /s/ Richard H. Thiele, Jr.

RICHARD H. THIELE, JR.
The Partner Acting
for the Firm
Attorneys for Defendant-Counterclaimant

Dated: June 9, 1977

CERTIFICATION

I am the defendant in the foregoing action. The allegations of this answer and counterclaim are true to the best of my knowledge, information and belief. This pleading is made in truth and good faith, and without collusion for the causes set forth therein.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false I am subject to punishment.

/s/ Mary Lea. J. D'Arc

MARY LEA J. D'ARC

Dated: June 8, 1977

SECOND SUPPLEMENT TO COMPLAINT
(Filed July 22, 1977)

Plaintiff, VICTOR D'ARC, by way of second supplement to his complaint, says as follows:

1. Plaintiff hereby supplements his complaint by adding the following sub-paragraph to paragraph 5 of said complaint:

(Z) The defendant, MARY LEA J. D'ARC, during the summer of the year 1975, attempted to hire one, Thomas Treacy to murder the plaintiff.

RUDD and ACKERMAN
Attorneys for Plaintiff

By /s/ Monroe Ackerman

MONROE ACKERMAN
A Member of the Firm

AFFIDAVIT OF VICTOR D'ARC

(Annexed to Foregoing Complaint)

STATE OF NEW JERSEY :
: SS.
COUNTY OF ESSEX :

VICTOR D'ARC, of full age, hereby certifies and deposes:

1. I am the plaintiff in the above entitled action.

2. I have read the within second supplement to complaint. The allegations thereof are true to the best of my knowledge, information and belief. The said second supplement to complaint is made in truth and good faith and without collusion for the cause set forth therein.

I hereby certify on this 20th day of July, 1977, that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Victor D'Arc MD.

VICTOR D'ARC

AMENDMENT TO COUNTERCLAIM

(Filed October 28, 1977)

The defendant, by way of amendment to her counterclaim, hereby adds a Fifth Count reading as follows:

FIFTH COUNT

Separation - No Fault

1. Defendant was lawfully married to the plaintiff on July 15, 1972, in New York City.

2. Plaintiff husband was a bona fide resident of the State of New Jersey when this cause of action arose, and has ever since and for more than one year next preceding the commencement of this action, continued to be a bona fide resident of New Jersey.

3. At the time of the filing of the complaint and presently, plaintiff has been domiciled at Merriewold West Farm, Far Hills, Somerset County, New Jersey, and defendant is presently domiciled in the City, County and State of New York.

4. There have been no children born of this marriage.

5. On or about February 25, 1976, the plaintiff and defendant separated and have ever since resided separate and apart within the meaning of N.J.S. 2A:34-2d.

6. There is no reasonable prospect of the reconciliation of the parties to this marriage.

7. Defendant repeats the allegations of Paragraphs 6 and 7 of the First Count of the Amended Counterclaim.

Wherefore, defendant-counterclaimant demands judgment on the Fifth Count of the Counterclaim:

(a) Dissolving the marriage between the parties;

(b) Equitably distributing all property, both real and personal, which was legally and beneficially acquired by the parties during the marriage, by transfering legal and equitable title thereto to the defendant.

(c) Permiting the defendant to resume her former maiden name of Mary Lea Johnson.

WHARTON, STEWART & DAVIS

By /s/ Richard H. Thiele, Jr.

RICHARD H. THIELE, JR.
The Partner Acting for the Firm
Attorneys for the Defenant

Dated: October 26, 1977

CERTIFICATION

I am the defendant in the foregoing action. The allegations of this amended counterclaim are true to the best of my knowledge, information and belief. This pleading is made in truth and good faith, and without collusion for the causes set forth therein.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Mary Lea J. D'Arc

MARY LEA J. D'ARC

Dated: October 26, 1977

PLAINTIFF'S ANSWER TO AMENDMENT TO COUNTERCLAIM.

(Filed November 9, 1977)

Plaintiff, VICTOR D'ARC, by way of answer to amendment to counterclaim, says as follows:

AS TO FIFTH COUNT—Separation—No Fault

1. Plaintiff admits the allegations of paragraph 1.

2. Plaintiff admits the allegations of paragraph 2.

3. In answer to paragraph 3, the plaintiff states that his domicile is Merriewold West Farm, Far Hills, Somerset County, New Jersey. He denies that the defendant is presently domiciled in the City, County and State of New York. Defendant is domiciled at the Merriewold West Farm, Far Hills, Somerset County, New Jersey, is in possession and control of said domicile and, through the use of armed guards and police harassment, has attempted to exclude the plaintiff from the use, occupation and enjoyment of said domicile.

4. Plaintiff admits the allegations of paragraph 4.

5. Plaintiff admits the allegations of paragraph 5.

6. Plaintiff admits the allegations of paragraph 6.

7. In answer to paragraph 7, the plaintiff repeats his answer to the allegations of paragraphs 6 and 7 of the first count of the amendment to counterclaim.

WHEREFORE, plaintiff demands judgment dismissing the fifth count of the defendant's amendment to counterclaim.

RUDD and ACKERMAN
Attorneys for Plaintiff

By: /s/ Monroe Ackerman

MONROE ACKERMAN
A Member of the Firm.

ORDER FOR PARTIAL JUDGMENT

(Filed December 28, 1977)

This matter having been partially heard by the Court in the presence of Rudd & Ackerman, Esquires, attorneys for the plaintiff, Monroe Ackerman, Esquire, appearing, and in the presence of Wharton, Stewart & Davis, Richard H. Thiele, Jr., Esquire, appearing, attorneys for the defendant, and the Court having heard and considered the proofs in this action and the argument of counsel, and it appearing that the plaintiff and the defendant were married on July 15, 1972, and that the parties have lived separate and apart in different habitations for a period of more than eighteen consecutive months, as alleged in the Amended Complaint and the Amended Counterclaim, and that there is no reasonable prospect of reconcilation, and that at the time the cause of action for divorce for such separation arose, the plaintiff was a bona fide resident of this State, and that the plaintiff has continued so to be down to the time of the commencement of this action, and that the plaintiff has been for more than one year next preceding the commencement of this action, a bona fide resident of this State, and it further appearing that each of the parties hereto have made out sufficient grounds for divorce against the other of them, entitling each of them to be granted a Decree therefor, pursuant to the statutes of this State, i.e. N.J.S. 2A:34-2d.

It is, therefore, on this 22 day of December, 1977, by the Superior Court, Chancery Division, of the State of New Jersey, ORDERED and ADJUDGED, by virtue of the power and authority of this Court and of the acts of the Legislature in such case made and provided, that the plaintiff, Victor D'Arc, and the defendant, Mary Lea J. D'Arc be and they are each divorced from the bond of matrimony for the cause aforesaid, and the parties, and each of them, be freed and discharged from the obligations thereof, and that the marriage between the parties is hereby dissolved.

It is FURTHER ORDERED, that the defendant is hereby permitted to resume her maiden name of Mary Lea Johnson.

And it is FURTHER ORDERED that the trial of this matter as to the remaining issues be adjourned until Monday, February 6, 1978, with leave to the parties to offer on such further proceedings any and all evidence which they deem pertinent to the remaining issues, subject to the rulings of this Court thereon;

And it is FURTHER ORDERED that the defendant furnish the plaintiff with a written report of the voiceprint examination conducted on December 20, 1977, on or before December 30, 1977, and the plaintiff have leave to take the depositions of the defendant's expert witnesses with reference to the voiceprint prior to January 18, 1978.

And it is FURTHER ORDERED, pursuant to R. 4:42-2, that the Judgment of this Court granting the divorce as set forth above is final inasmuch as there is no just reason for delay, despite the reservation for trial of other issues.

/s/ Michael R. Imbriani, J.C.C.

MICHAEL R. IMBRIANI, J.C.C.
Temporarily Assigned

This matter having been tried before the Court commencing on December 12, 1977, and concluding on July 27, 1978, in the presence of Monroe Ackerman, Esquire, attorney for the plaintiff, and Wharton, Stewart & Davis, Esquires, Richard H. Thiele, Jr., Esquire, appearing, attorneys for the defendant, and the Court having heard and considered the evidence and having signed a judgment of divorce on December 20, 1977, as more fully appears in the record of this proceeding, and having heard and considered further evidence on the issues of alimony and equitable distribution of marital assets and counsel fees and having filed a written opinion dated November 20, 1978, and good cause appearing;

It is on this 1st day of December, 1978, ORDERED and ADJUDGED as follows:

1. The husband's claim for alimony is denied.

2. The husband's claim for equitable distribution of any assets is denied except that he may retain the net proceeds from the sale of the "U.N. apartment" asserted by him to be $120,000; the cash proceeds, assertedly $16,000, received by him from the sale of 1000 shares of stock of the Bernards State Bank; the bank accounts and life insurance policies which he cashed and appropriated to his own use in the estimated amount of $25,000 and the proceeds he realized from the sale of art objects sold prior to December 20, 1977, the date of the judgment of divorce.

3. All of the following assets or any beneficial interest therein, whether in the name of the parties, partnerships or corporations shall be distributed to the defendant wife and the husband shall execute any and all instruments necessary to accomplish such transfers covering the following property:

(a) All real property in the Borough of Far Hills, Somerset County, New Jersey, whether title is held in the individual names of the parties or in corporate names, e.g., Far Hills Nursery, Inc.

(b) All stock in Merriewold West, Inc. and any other corporations formed for the purpose of dealing in art objects.

(c) All art objects, including those removed by the husband from the inventory of Merriewold West, Inc., or from the defendant's personal collection, except for those sold prior to December 20, 1977.

(d) The cash funds now held in escrow by Wharton, Stewart & Davis, attorneys for the defendant, which resulted from the sale of certain real property in California.

(e) All real property in the Township of Bridgewater, Somerset County, New Jersey.

(f) All real property in the Bernards State Bank.

(g) All stock in the parties in and to certain properties in the Town and Township of Clinton, Hunterdon County, New Jersey, whether held in individual names or in the name of Clinton Investment Partners, a partnership, specifically including a $50,000 Certificate of Deposit or the proceeds thereof held by the husband in a New York City bank.

(h) All right, title and interest in and to all film projects or theatrical productions, whether held in corporate, partnership or individual name, including but not limited to Rockabye Hamlet, The Norman Conquests and Fort Apache.

4. The defendant shall have leave to take the depositions of the plaintiff to secure information relative to the art objects remaining in the possession of the plaintiff as of December 20, 1977, and such other information as may be necessary or pertinent with reference to other items which the plaintiff is directed to return to the defendant under the terms of this judgment.

5. The defendant shall be solely responsible for any mortgage, lien or indebtedness covering any of the assets to be returned by the plaintiff to the defendant and shall hold the plaintiff free and harmless from any liability as to any such mortgage, lien or indebtedness.

6. The defendant shall pay a counsel fee of $15,000 directly to Monroe Ackerman, Esquire, the attorney for the plaintiff Victor D'Arc, which payment shall be applied on account of Dr. D'Arc's counsel fees. Further, the defendant shall pay the fees for the services of Earl F. Kane, a court appointed polygraph operator, who conducted investigations in this matter.

/s/ Michael R. Imbriani

MICHAEL R. IMBRIANI, J.C.C.
Temporarily Assigned

NOTICE OF APPEAL

(Filed December 18, 1978)

To: HONORABLE MICHAEL R. IMBRIANI
Court House
Somerville, New Jersey 08876

WHARTON, STEWART and DAVIS,
Attorneys for Defendant
P.O. Box 640
50 West Main Street
Somerville, New Jersey 08876

NOTICE is hereby given that the plaintiff, VICTOR D'ARC, represented by MONROE ACKERMAN, ESQ., having his office at 830 Morris Turnpike, Short Hills, New Jersey, appeals to the Superior Court of New Jersey, Appellate Division, from the whole of the final judgment of divorce entered on December 1, 1978, of the Superior Court of New Jersey, Chancery Division, Somerset County, Docket Number M-2404-76.

The Judge who entered said judgment in the Chancery Division was the Honorable Michael R. Imbriani.

/s/ Monroe Ackerman

MONROE ACKERMAN
Attorney for Plaintiff.

I hereby certify that on December 15, 1978, I complied with the requirements of Rule 2:5-3(a), copies of which requests are attached hereto.

/s/ Monroe Ackerman

MONROE ACKERMAN
Attorney for Plaintiff.

NOTICE OF CROSS APPEAL

(Filed December 29, 1978)

PLEASE TAKE NOTICE that the respondent-cross appellant, Mary Lea J. D'Arc, hereby cross appeals to the Appellate Division of the Superior Court of New Jersey, from the following determinations included in the judgment in this action dated December 21, 1978:

(A) So much of paragraph 2 as allows any equitable distribution to the plaintiff, specifically including, but not limited to, the proceeds of the sale of art objects sold by the plaintiff husband prior to December 20, 1977, and the refusal to allow the defendant wife an accounting for the assets appropriated by the plaintiff husband.

(B) The allowance of a counsel fee in the amount of $15,000 to the attorney for the plaintiff and the direction that the defendant pay the fees of the court appointed polygraph operator as set forth in paragraph 6 of the judgment, as well as the failure of the Court below to assess the expenses of spectrographic investigations against the plaintiff husband.

* * *

We certify that a copy of the within notice of cross appeal has been served upon adverse counsel and the Honorable Michael R. Imbriani on the date set forth below according to the provisions of Rule 2:5-1(e).

WHARTON, STEWART & DAVIS

By: /s/ Richard H. Thiele, Jr.

RICHARD H. THIELE, JR.
The Partner Acting for the Firm
Attorneys for the
Respondent-Cross Appellant

Dated: December 26, 1978

AMENDED NOTICE OF APPEAL
(Filed April 16, 1979)

(Annexed to Foregoing Notice of Cross-Appeal)

To: HONORABLE MICHAEL R. IMBRIANI
Court House
Somerville, New Jersey 08876

WHARTON, STEWART and DAVIS,
Attorneys for Defendant
P.O. Box 640
50 West Main Street
Somerville, New Jersey 08876

NOTICE is hereby given that the plaintiff, VICTOR D'ARC represented by MONROE ACKERMAN, ESQ., having his office at 830 Morris Turnpike, Short Hills, New Jersey, appeals to the Superior Court of New Jersey, Appellate Division, from the whole of the final judgment entered on December 1, 1978, of the Superior Court of New Jersey, Chancery Division, Somerset County, Docket No. M-2404-76.

The Judge who entered said judgment in the Chancery Division was the Honorable Michael R. Imbriani.

/s/ Monroe Ackerman

MONROE ACKERMAN
Attorney for Plaintiff.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin

APPENDIX B

Statutes, Constitutional Provisions and Rules

FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any

PREVIOUS PAGE WAS BLANK

State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONSTITUTION ART. 4, § 7, 3.

3. Bills of attainder; ex post facto laws; contracts

3. The Legislature shall not pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.

18 U.S.C.A. § 2510-2520

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or

operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision

thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a persn who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 112.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213.

§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications, knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 214.

§ 2513. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 215.

§ 2514. Immunity of witnesses

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime danger-

ous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication of such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of,

the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 217.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thrity days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any

wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer,

agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218.

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by

subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 222.

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 223.

U.S.C.A. Const. Art. 1 § 10

Impairment of contracts; title of nobility

*** or Law imposing the obligation of contracts, or grant of any Title of Nobility.

28 U.S.C.A. § 1257

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

N.J.S.A. 2A: 156-1 THROUGH 26

2A:156A-1. Short Title

This act shall be known and may be cited as the "New Jersey Wiretapping and Electronic Surveillance Control Act."

L.1968, c.409, § 1.

2A:156A-2. Definitions

As used in this act:

a. "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by wire, cable or other like connection between the point or origin and the point of reception furnished or operated by a telephone, telegraph or radio company for hire as a communication common carrier;

b. "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

c. "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device;

d. "Intercepting device" means any device or apparatus that can be used to intercept a wire or oral communication other than

(1) Any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by a communication common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or being used by a communication common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties; or

(2) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

e. "Person" means that term as defined in R.S. 1:1-2[1] and includes any officer or employee of the State or of a political subdivision thereof;

f. "Investigative or law enforcement officer" means any officer of the State of New Jersey or of a political subdivision thereof who is empowered by law to conduct investigations of, or to make arrests for, any offense enumerated in section 8 of this act and any attorney authorized by law to prosecute or participate in the prosecutions of any such offense;

g. "Contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

h."Court of competent jurisdiction" means the Superior Court;

i. "Judge," when referring to a judge authorized to receive applications for, and to enter, orders authorizing interceptions of wire or oral communications, means one of the several judges of the Superior Court to be designated from time to time by the Chief Justice of the Supreme Court to receive applications for, and to enter, orders authorizing interceptions of wire or oral communications pursuant to this act;

j."Communication common carrier" means any person engaged as a common carrier for hire, in intrastate, interstate or foreign communication by wire or radio or in intrastate, interstate or foreign radio transmission of energy; but a person engaged in radio broadcasting shall not, while so engaged, by deemed a common carrier;

k. "Aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

L.1968, c. 409, § 2.

[1]N.J.S.A. § 1:1-2.

2A:156A-3. Interception, disclosure or use of wire or oral communications; violation; penalty

Except as otherwise specifically provided in this act, any person who:

a. Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication; or

b. Willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication; or

c. Willfully uses or endeavors to use the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire or oral communication;

shall be guilty of a misdemeanor and shall be fined not more than $10,000.00 or imprisoned not more than 5 years, or both. Subsections b and c of this section shall not apply to the contents of any wire or oral communication, or evidence derived therefrom, that has become common knowledge or public information.

L.1968, c. 409, § 3.

2A:156A-4. Exceptions

It shall not be unlawful under this act for:

a. An operator of a switchboard, or an officer, agent or employee of a communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication. No communication common carrier shall utilize service observing or random monitoring except for mechanical or service quality control checks;

b. A person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; or

c. A person not acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act.

L.1968, c. 409, § 4.

2A:156A-5. Possession, sale, distribution, manufacture, or advertisement of intercepting devices; violation; penalty

Except as otherwise specifically provided in section 6 of this act,[1] any person who:

a. Willfully possesses an intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication;

b. Willfully sells an intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication;

c. Willfully distributes an intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication;

d. Willfully manufactures or assembles an intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication; or

e. Willfully places in any newspaper, magazine, handbill, or other publication any advertisement of any intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication or of any intercepting device where such advertisement promotes the use of such device for the purpose of the surreptitious interception of a wire or oral communication;

shall be guilty of a misdemeanor and shall be fined not more than $10,000.00 or imprisoned not more than 5 years, or both.

L. 1968, c. 409, § 5.

[1] Section 2A:156A-6.

2A:156A-6. Exceptions

It shall not be unlawful under this act for:

a. A communication common carrier or an officer, agent or employee of, or a person under contract with a communication common carrier, in the usual course of the communication common carrier's business; or

b. A person under contract with the United States, a state or a political subdivision thereof, or an officer, agent, or employee of a state or a political subdivision thereof;

to possess, sell, distribute, manufacture or assemble, or advertise any intercepting device, while acting in furtherance of the appropriate activities of the United States, a state or a political subdivision thereof or a communication common carrier.

L.1968, c. 409, § 6.

2A:156A-7. Nuisance; seizure and forfeiture of intercepting devices

Any intercepting device possessed, used, sent, distributed, manufactured, or assembled in violation of this act is hereby declared to be a nuisance and may be seized and forfeited to the State.

L.1968, c. 409, § 7.

2A:156A-8. Order authorizing interception of wire or oral communications

The Attorney General, a county prosecutor or the chairman of the State Commission of Investigation when authorized by a majority of the members of that commission or a person designated to act for such an official and to perform his duties in and during his actual absence or disability may authorize, in writing, an ex parte application to a judge designated to receive the same for an order authorizing the interception of a wire or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation when such interception may provide evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, loan sharking, dealing in narcotic drugs, marijuana or other dangerous drugs, arson, burglary, embezzlement, forgery,receiving stolen property, escape, alteration of motor vehicle identification numbers or larceny punishable by imprisonment for more than one year, or any conspiracy to commit any of the foregoing offenses or which may provide evidence aiding in the apprehension of the perpetrator of any of the foregoing offenses.

L.1968, c. 409, § 8.

2A:156A-9. Application for order; contents

Each application for an order of authorization to intercept a wire or oral communication shall be made in writing upon oath or affirmation and shall state:

a. The authority of the applicant to make such application;

b. The identity and qualifications of the investigative or law enforcement officers or agency for whom the authority to intercept a wire or oral communication is sought and the identity of whoever authorized the application;

c. A particular statement of the facts relied upon by the applicant, including:

(1) The identity of the particular person, if known, committing the offense and whose communications are to be intercepted;

(2) The details as to the particular offense that has been, is being, or is about to be committed;

(3) The particular type of communication to be intercepted;

(4) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be intercepted;

(5) A statement of the period of time for which the interception is required to be maintained; if the character of the investigation is such that the authorization

for interception should not automatically terminate when the described type of communication has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(6) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;

d. Where the application is for the renewal or extension of an order, a particular statement of facts showing the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results;

e. A complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to intercept a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each such application; and

f. Such additional testimony or documentary evidence in support of the application as the judge may require.

L.1968, c. 409, § 9.

2A:156A-10. Grounds for entry of order

Upon consideration of an application, the judge may enter an ex parte order, as requested or as modified, authorizing the interception of a wire or oral communication, if the court determines on the basis of the facts submitted by the applicant that there is or was probable cause for belief that:

a. The person whose communication is to be intercepted is engaging or was engaged over a period of time as a part of a continuing criminal activity or is committing, has or had committed or is about to commit an offense as provided in section 8 of this act;[1]

b. Particular communications concerning such offense may be obtained through such interception;

c. Normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;

d. The facilities from which, or the place where, the wire or oral communications are to be intercepted, are or have been used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by, such individual; and

e. The investigative or law enforcement officers or agency to be authorized to intercept the wire or oral communication are qualified by training and experience to execute the interception sought.

L.1968, c.409, § 10.

[1] Section 2A:156A-8

2A:156A-11. Public facilities; additional grounds for issuance of order

If the facilities from which a wire communication is to be intercepted are public, no order shall be issued unless the court, in addition to the matters provided in section 10 above,[1] determines that there is a special need to intercept wire communications over such facilities.

If the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, or are leased to, listed in the name of, or commonly used by, a licensed physician, an attorney-at-law, or practicing clergyman, or is a place used primarily for habitation by a husband and wife, no order shall be issued unless the court, in addition to the matters provided in section 10 above, determines that there is a special need to intercept wire or oral communications over such facilities or in such places. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this act, shall lose its privileged character.

L.1968, c.409, § 11.

[1] Section 2A:156A-10.

2A:156A-12. Required statements in order; scope of order; extensions and renewals; progress reports

Each order authorizing the interception of any wire or oral communication shall state:

a. The judge is authorized to issue the order;

b. The identity of, or a particular description of, the person, if known, whose communications are to be intercepted;

c. The character and location of the particular communication facilities as to which, or the particular place of the communication as to which, authority to intercept is granted;

d. A particular description of the type of the communication to be intercepted and a statement of the particular offense to which it relates;

e. The identity of the investigative or law enforcement officers or agency to whom the authority to intercept a wire or oral communication is given and the identity of whoever authorized the application; and

f. The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

No order entered under this section shall authorize the interception of any wire or oral communication for a period of time in excess of that necessary under the circumstances. Every order entered under this section shall require that such interception begin and terminate as soon as practicable and be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this act. In no case shall an order entered under this section authorize the interception of wire or oral communications for any period exceeding 30 days. Extensions or renewals of such an order may be granted for periods of not more than 30 days. No extension or renewal shall be granted unless an application for it is made in accordance with this section, and the court makes the findings required by sections 10, 11[1] and this section.

Whenever an order authorizing an interception is entered, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the court may require.

L.1968, c.409, § 12.

[1] Sections 2A:156A-10, 2A:156A-11.

2A:156A-13. Emergency situations; authority to grant verbal approval for interception without order

Whenever, upon informal application by an authorized applicant, a judge determines there are grounds upon which an order could be issued pursuant to this act, and that an emergency situation exists with respect to the investigation of conspiratorial activities of organized crime, related to an offense designated in section 8 of this act,[1] dictating authorization for immediate interception of wire or oral communication before an application for an order could with due diligence be submitted to him and acted upon, the judge may grant verbal approval for such interception without an order, conditioned upon the filing with him, within 48 hours thereafter, of an application for an order which, if granted, shall recite the verbal approval and be retroactive to the time of such verbal approval. Such interception shall immediately terminate when the communication sought is obtained or when the application for an order is denied. In the event no application for an order is made, the content of any wire or oral communication intercepted shall be treated as having been obtained in violation of this act.

In the event no application is made or an application made pursuant to this section is denied, the court shall require the wire, tape or other recording of the intercepted communication to be delivered to, and sealed by, the court and such evidence shall be retained by the court in accordance with section 14[2] and the same shall not be used or disclosed in any legal proceeding except in a civil action brought by an aggrieved person pursuant to section 24[3] or as otherwise authorized by court order. Failure to effect delivery of any such wire, tape or other recording shall be punishable as contempt by the court directing such delivery. Evidence of verbal authorization to intercept an oral or wire communication shall be a defense to any charge against the investigating or law enforcement officer for engaging in unlawful interception.

L. 1968, c. 409, § 13.

[1] Section 2A:156A-8.
[2] Section 2A:156A-14.
[3] Section 2A:156A-24.

2A:156A-14. Recording of intercepted communications; custody, destruction; duplicate tapes or wires

Any wire or oral communication intercepted in accordance with this act shall, if practicable, be recorded by tape, wire or other comparable method. The recording shall be done in such a way as will protect it from editing or other alteration. Immediately upon the expiration of the order or extensions or renewals thereof, the tapes, wires or other recordings shall be transferred to the judge issuing the order and sealed under his direction. Custody of the tapes, wires or other recordings shall be maintained wherever the court directs. They shall not be destroyed except upon an order of such court and in any event shall be kept for 10 years. Duplicate tapes, wires or other recordings may be made for disclosure or use pursuant to subsection a of section 17 of this act.[1] The presence of the seal provided by this section, or a satisfactory explanation for its absence, shall be a prerequisite for the disclosure of the contents of any wire or oral communication, or evidence therefrom, under subsection b of section 17 of this act.

L. 1968, c. 409, § 14.

[1] Section 2A:156A-17.

2A:156A-15. Sealing of applications, orders and supporting papers; destruction; disclosure of contents; violations

Applications made and orders granted pursuant to this act and supporting papers shall be sealed by the court and shall be held in custody as the court shall direct and shall not be destroyed except on order of the court and in any event shall be kept for 10 years. They may be disclosed only upon a showing of good cause before a court of competent jurisdiction.

Any violation of the provisions of this section may be punished as contempt of the issuing or denying court.

L.1968, c.409, § 15.

2A:156A-16. Service of inventory by judge; contents; inspection of intercepted communications, applications and orders

Within a reasonable time but not later than 90 days after the termination of the period of the order or of extensions or renewals thereof, or the date of the denial of an order applied for under section 13,[1] the issuing or denying judge shall cause to be served on the person named in the order or application, and such other parties to the intercepted communications as the judge may in his discretion determine to be in the interest of justice, an inventory which shall include:

a. Notice of the entry of the order or the application for an order denied under section 13;

b. The date of the entry of the order or the denial of an order applied for under section 13;

c. The period of authorized or disapproved interception; and

d. The fact that during the period wire or oral communications were or were not intercepted.

The court, upon the filing of a motion, may in its discretion make available to such person or his attorney for inspection such portions of the intercepted communications, applications and orders as the court determines to be in the interest of justice. On an ex parte showing of good cause to the court the serving of the inventory required by this section may be postponed.

L.1968, c.409, § 16.

[1] Section 2A:156A-13.

2A:156A-17. Disclosure or use of contents of wire or oral communication or derivative evidence

a. Any investigative or law enforcement officer who, by any means authorized by this act, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose or use such contents or evidence to another investigative or law enforcement officer to the extent that such disclosure or use is appropriate to the proper performance of his official duties.

b. Any person who, by any means authorized by this act, has obtained any information concerning any wire or oral communication or evidence derived therefrom intercepted in accordance with the provisions of this act, may disclose the contents of such communication or derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of this or another State or of the United States or before any Federal or State grand jury.

c. The contents of any intercepted wire or oral communication, or evidence derived therefrom, may otherwise be disclosed or used only upon a showing of good cause before a court of competent jurisdiction.

L.1968, c.409, § 17.

2A:156A-18. Interception of communications relating to other offenses; disclosure or use; application

When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsection a of section 17.[1] Such contents and any evidence derived therefrom may be used under subsection b of section 17 when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this act. Such application shall be made as soon as practicable.

L.1968, c.409, § 18.

[1] Section 2A:156A-17.

2A:156A-19. Unlawful use or disclosure of existence of order or information concerning intercepted communication or derivative evidence

Except as specifically authorized pursuant to this act any person who uses or discloses the existence of an order authorizing interception of a wire or oral communication or the contents of, or information concerning, an intercepted wire or oral communication or evidence derived therefrom, is guilty of a misdemeanor.

L.1968, c.409, § 19.

2A:156A-20. Service of copy of order and application before disclosure of intercepted communication in trial, hearing or proceeding

The contents of any wire or oral communication intercepted in accordance with the provisions of this act, or evidence derived therefrom, shall not be disclosed in any trial, hearing, or proceeding before any court of this State unless not less than 10 days before the trial, hearing, or proceeding the parties to the action have been served with a copy of the order and accompanying application under which the interception was authorized.

The service of inventory, order, and application required by this section may be waived by the court where it finds that the service is not practicable and that the parties will not be prejudiced by the failure to make the service.

L.1968, c.409, § 20.

2A:156A-21. Motion to suppress contents of intercepted communication or derivative evidence; grounds; appeal

Any aggrieved person in any trial, hearing, or proceeding in or before any court or other authority of this State may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that:

a. The communication was unlawfully intercepted;

b. The order of authorization is insufficient on its face;

c. The interception was not made in conformity with the order of authorization.

The motion shall be made at least 10 days before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the moving party was not aware of the grounds for the motion. The court, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication, or evidence derived therefrom, as the court determines to be in the interests of justice. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall not be received in evidence in the trial, hearing or proceeding.

In addition to any other right to appeal, the State shall have the right to appeal from an order granting a motion to suppress if the official to whom the order authorizing the intercept was granted shall certify to the court that the appeal is not taken for purposes of delay. The appeal shall be taken within the time specified by the Rules of Court and shall be diligently prosecuted.

L.1968, c.409, § 21.

2A:156A-22. Report by issuing or denying judge to Administrative Director of courts; contents

Within 30 days after the expiration of an order or an extension or renewal thereof entered under this act or the denial of an order confirming verbal approval of interception, the issuing or denying judge shall make a report to the Administrative Director of the courts stating that:

a. An order, extension or renewal was applied for;

b. The kind of order applied for;

c. The order was granted as applied for, was modified, or was denied;

d. The period of the interceptions authorized by the order, and the number and duration of any extensions or renewals of the order;

e. The offense specified in the order, or extension or renewal of an order;

f. The identity of the person authorizing the application and of the investigative or law enforcement officer and agency for whom it was made; and

g. The character of the facilities from which or the place where the communications were to be intercepted.

L.1968, c.409, § 22.

2A:156A-23. Annual reports by Superior Court judges and Chief Justice of Supreme Court

In addition to reports required to be made by applicants pursuant to Federal law, all judges of the Superior Court authorized to issue orders pursuant to this act shall make annual reports on the operation of this act to the Administrative Director of the Courts. The reports by the judges shall contain (1) the number of applications made; (2) the number of orders issued; (3) the effective periods of such orders; (4) the number and duration of any renewals thereof; (5) the crimes in connection with which the conversations were sought; (6) the names of the applicants; and (7) such other and further particulars as the Administrative Director of the Courts may require.

The Chief Justice of the Supreme Court shall annually report to the Governor and the Legislature on such aspects of the operation of this act as he deems appropriate including any recommendations he may care to make as to legislative changes or improvements to effectuate the purposes of this act and to assure and protect individual rights.

L.1968, c.409, § 23.

2A:156A-24. Civil action for unlawful interception, disclosure or use of wire or oral communication; damages; attorneys' fees

Any person whose wire or oral communication is intercepted, disclosed or used in violation of this act shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

a. Actual damages, but not less than liquidated damages computed at the rate of $100.00 a day for each day of violation, or $1,000.00, whichever is higher;

b. Punitive damages; and

c. A reasonable attorney's fee and other litigation costs reasonably incurred.

L.1968, c.409, § 24.

2A:156A-25. Good faith reliance on, court order as defense

A good faith reliance on a court order authorizing the interception shall constitute a complete defense to a civil or criminal action brought under this act or to administrative proceedings brought against a law enforcement officer.

L.1968, c.409, § 25.

2A:156A-26. Partial invalidity

If any section, subsection or portion or provision of any section or sections of this act or the application thereof by or to any person or circumstances is declared invalid, the remainder of the section or sections or subsection of this act and the application thereof by or to other persons or circumstances shall not be affected thereby.

L.1968, c.409, § 26.

RULE 8. PRELIMINARY INQUIRY BY JUDGE

(1) When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In his determination the rules of evidence shall not apply except for Rule 4 or a valid claim of privilege. The judge shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as

implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury. This rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(2) Where evidence is otherwise admissible if relevant and its relevance is subject to a condition, the judge shall admit it if there is sufficient evidence to support a finding of the condition. In such cases the judge shall instruct the jury to consider the issue of the fulfillment of the condition and to disregard the evidence if they find that the condition was not fulfilled. The judge shall instruct the jury to disregard the evidence if he subsequently determines that a jury could not reasonably find that the condition was fulfilled.

(3) Where by virtue of any rule of law a judge is required in a criminal action to make a preliminary determination as to the admissibility of a statement by the defendant, the judge shall hear and determine the question of its admissibility out of the presence of the jury. In such a hearing the rules of evidence shall apply and the burden of proof as to admissibility of the statement is on the prosecution. If the judge admits the statement he shall not inform the jury that he has made a finding that the statement is admissible, and he shall instruct the jury that they are to disregard the statement if they find that it is not credible. If the judge subsequently determines from all of the evidence that the statement is not admissible, he shall take appropriate action. Adopted June 6, 1967 to be effective September 11, 1967; amended September 15, 1975 to be effective July 1, 1976.

No. 80-1526

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In The

Supreme Court of the United States

OCTOBER TERM, 1980

VICTOR D'ARC,
Petitioner,

-vs-

MARY LEA J. D'ARC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. As the state courts did not apply a "preferred suitor" doctrine favoring either wife or husband but merely declined enforcement of an agreement between husband and wife on a specific finding that enforcement would be "unfair, unjust and inequitable" in the circumstances, which included lack of independent advice or legal counsel of any kind, does the determination below create any question under the equal protection clause of the Fourteenth Amendment of the United States Constitution or Article 1, Section 10, of the United States Constitution prohibiting laws impairing the obligation of contract?

2. Does New Jersey's equitable distribution of marital assets offend the due process clause of the Fourteenth Amendment to the United States Constitution where it is applied to a residence purchased by the wife prior to marriage, placed in her future husband's name and then occupied by both parties during a marriage which terminated by separation followed by the husband's unsuccessful attempt to assassinate his spouse?

3. Does the admission of evidence in a civil proceeding of telephone conversations authenticated in part by hearsay evidence of its recording by one of the parties to the conversations violate the provisions of 18 U.S.C. Secs. 2510-2520 or create any constitutional issue?

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STATEMENT OF CASE

The parties in this matrimonial proceeding, both in their early fifties, married on June 15, 1972, and separated on February 22, 1976.[1] It was a second marriage for each. Dr. Victor D'Arc, the plaintiff, was the father of two teen-age daughters, and Mary Lea Johnson D'Arc, hereafter Mary Lea Johnson, is the mother of six children by a prior marriage.

Dr. D'Arc, a psychiatrist, engaged in a private practice in New York prior to the marriage with an income reported by him at approximately $50,000 annually. After the marriage, he gradually abandoned his practice and the parties devoted themselves to the expenditure of Ms. Johnson's substantial funds. Throughout the marriage and, indeed, for a year prior thereto when the parties lived together, Dr. D'Arc was supported in a life of leisure with funds from a trust created for Ms. Johnson's benefit by her father many years ago.

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[1] The facts are well summarized in the trial court opinion. Little elaboration is required. See Pa. 36 et seq.; D'Arc v. D'Arc, 164 N.J. Super. 226, 395 A.2d 1270, 1273-77 (Chan. Div. 1978), modified, 175 N.J. Super. 598, 421 A.2d 602 (App. Div. 1980), certif. den., ___ N.J. ___, ___ A.2d. ___ (1980).

Among these expenditures were acquisitions of real property in New Jersey and elsewhere including - significantly for this proceeding - a condominimum known as the U.N. apartment purchased by Ms. Johnson with her funds prior to her marriage to Dr. D'Arc. Title to this condominium was placed in Dr. D'Arc's name, and the parties occupied it during the three and a half years of marriage. They separated in February 1976. Dr. D'Arc resumed his practice of psychiatry and at the time of the trial was earning $40,000 as an employee of the State of New York with additional income accruing from a private practice.

At trial, Dr. D'Arc argued for a sizable equitable distribution of property to him from Ms. Johnson despite the fact that the Doctor had contributed nothing in a financial way to the acquisition of the marital property. Primarily, he contends that he was entitled to a share of the money he helped his wife spend during the marriage. The record below demonstrated that the Doctor had been fully supported by his wife during this brief marriage. Further, after separation he appropriated to himself nearly $260,000 in assets none of which have been returned despite outstanding court orders. He stood below and still stands in continuing contempt of the courts of the State of New Jersey.

Two further matters merit consideration. First, there is the written agreement between the parties úpon which the husband relies. Second, the trial court found as a fact that, after his marriage deteriorated, Dr. D'Arc plotted to murder Ms. Johnson with the obvious purpose of obtaining a substantial share of her estate. On the matter of the agreement, the record shows that in February, 1976, the parties had come to a parting of the ways. On a morning drive from their New York apartment to their residence in Far Hills, New Jersey, Dr. D'Arc discussed with his wife a basis for separation. After this discussion, the husband typed a one page agreement at the Far Hills home, obtained his wife's signature and affixed his own. This agreement (Exhibit D-1) appears in its entirety as the Appendix to this Brief. The literal and very liberal terms of this one page document purports to provide Dr. D'Arc with a "tax-free" monthly income of $10,000 at an annual cost to Ms. Johnson in excess of $400,000. Neither party consulted counsel in connection with this arrangement, and, after making payments for March and April of 1976, Ms. Johnson terminated the arrangement on the advice of her lawyer.

More dramatic was the murder plot which dominated the testimony in this lengthy trial. On the evidence, including taped telephone conversations between Dr. Victor D'Arc and one Theodore Fino, the trial judge pronounced himself "satisfied that Ms. Johnson has proven by a preponderance of the evidence that her husband, Dr. D'Arc, was the person on the taped telephone recordings who offered Fino $50,000 to murder her." P.A. 23; 395 A.2d at 1276. On the basis of this finding, the New Jersey courts denied Dr. D'Arc alimony and ordered equitable distribution of all of the marital property, including the U.N. apartment, to Ms. Johnson. Dr. D'Arc seeks certiorari on asserted constitutional grounds.

These alleged bases for further review are briefly discussed in the argument which follows.

REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

A. The Decision Below Rests On An Adequate, Independent State Ground.

While the Appellate Division of the Superior Court of New Jersey decided this case on the merits on October 10, 1980, and the Supreme Court of New Jersey subsequently denied certification, D'Arc v. D'Arc, 175 N.J. Super. 598, 421 A.2d 602 (App. Div. 1980), certif. den. _____ N.J. _____, ___ A.2d ___ (1980), the Appellate Division noted a separate ground for dismissing the husband's appeal, to wit, his continuing and persisting contempt of the judgments entered below. See the Appellate Division opinion at P.A. 35a-36a and authorities cited. In fact, the Appellate Division considered the merits of the husband's appeal only because its "determination of the [wife's] cross-appeal results in disposition of plaintiff's appeal." P.A. 34; 421 A.2d supra, at 603. Obviously, the New Jersey holding adverse to the petitioner rests on an independent nonconstitutional ground, i.e., a continuing contempt which itself justified dismissing his appeal by reason of a clear violation of New Jersey practice.

B. None Of The Issues Raised By The Petitioner Present Either Constitutional Issues Or Substantial Federal Questions Requiring The Intervention Of The United States Supreme Court.

First, the husband contends that the courts below, which refused to enforce an agreement between husband and wife, in some way violated his constitutional rights on two theses. On the one hand, he argues that refusal to enforce this agreement violates the sanctity of contracts contrary to Article 1, Section 10, of the United States Constitution. Wholly aside from the fact that this argument was never advanced in the trial court, it is utterly lacking in merit. Courts of equity have historically reviewed agreements between husband and wife to determine their fairness. Herr, II N.J. Practice, Marriage, Divorce & Separation Sec. 801 (1950). The matter is most recently discussed in Carlsen v. Carlsen, 72 N.J. 363, 371 A.2d 8, 12 (1977); see also Justice Pashman's extensive discussion of the equitable power to modify separation agreements in Lepis

v. Lepis, 83 N.J. 32, 416 A.2d 45, 48-50 (1980).

Further, the husband reiterates an argument pursued in the state courts to the effect that a wife is no longer a "preferred suitor" entitled to special protection in light of the liberation of women. As to the former practice in New Jersey, see e.g., Wolff v. Wolff, 134 N.J. Eq. 8, 34 A.2d 150 (Chan. 1943). On this particular issue, the wife advanced and the New Jersey courts accepted a contention that the modern approach to agreements between husband and wife should not deny the wife protection because she no longer has a "preferred" status but rather should accord like protection to both husband and wife in view of the confidential relationship between these parties.

While the husband argues that the emancipation of women has ended any presumption of undue influence or improper conduct on the part of the husband, the fact remains that, when a husband and wife are living together and make a contract, they occupy a confidential relationship. This relationship runs to each other, and the rule, as accepted by the New Jersey courts, is that, at least any party granting greater benefits to the other, whether it be husband or wife, should have independent advice, and second, that a court should approve such agreements as fair and equitable. The courts below followed this doctrine. It is sound law.

Specifically, on the point, the trial judge, The Honorable Michael R. Imbriani, speaking for the Chancery Division of the New Jersey Superior Court, found that it would be "unfair, unjust and inequitable to enforce the February 22, 1976 agreement." P.A. 26a; 395 A.2d, supra, at 1271. Judge Imbriani's conclusion rested upon a finding that the agreement was not clear, particularly concerning the issue of what the parties thought to be fair and equitable as alimony should there be a divorce, a course of action neither apparently contemplated at the time the agreement was prepared. Further, the court below accepted the contention that it was unfair to have the wife sign this agreement without the legal advice she had been accustomed to seek with reference to all business problems. Nothing in the opinion expressly or by implication gives any "preferred" status to any suitor, husband or wife. The fact that many New Jersey cases are couched in terms of a husband's influence over a wife bespeaks the facts and mores of the past rather than any decision of the present. In point of fact, the New Jersey Supreme Court in Carlsen v. Carlsen, supra, held, long after the emancipation of women in this State, that any contract between husband and wife is enforceable if a court finds it "to be fair and equitable." 371 A.2d supra, at 12.

Second, the husband contends that New Jersey's equitable distribution of the parties' property following termination of his marriage is unconstitutional as a denial of substantive due process as applied to property previously acquired by him, i.e., the U.N. apartment. Nowhere in the husband's petition does he reveal what the record below clearly shows: title to the U.N. apartment was acquired by Dr. D'Arc from Ms. Johnson who paid for the condominium while they were living together for a year prior to the marriage. The parties then resided as husband and wife in that apartment throughout the marriage.

N.J.S.A. 2A:34-23 vests New Jersey courts with the power, upon the granting of a divorce, "to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage." In this case, the New Jersey courts have held that this language covers real estate purchased by a wife with her funds and placed in her husband's name prior to marriage. No citation of authority, of course, is required to demonstrate that this holding as to the construction of New Jersey law is binding upon the United States Supreme Court. Nor is it difficult to see the rationale which suggests that, where parties, intending marriage, acquire a residence, place it in the name of one or the other and then reside in it, such property becomes an asset "legally and beneficially acquired by them" during the marriage. In any case, this construction by the New Jersey Supreme Court in no way violates the Fourteenth Amendment to the Constitution of the United States - it represents at most an arguable contention as to the construction of a New Jersey statute as to which the New Jersey courts are the final authority.

* * *

Further, the husband complains of New Jersey's decision to deny him any equitable distribution at all on the ground that he sought to murder his wife. He argues that this application fails to recognize an asserted New Jersey doctrine that "marital fault" has no bearing when it comes to equitable distribution. This argument obviously fails to raise even a colorable issue under the Constitution of the United States. Surely, a state rule which denies equitable distribution to a husband who tries to murder his wife does not violate the Federal Constitution. Indeed, a contrary rule would violate common sense and perhaps the Constitution as well.

Briefly stated, the husband concedes, as he must, that, if he had successfully murdered his wife, he would have been barred from any share in her estate. E.G., **Small v. Rockfeld, 66 N.J. 231, 330 A.2d 335 (1974).** However, he goes on to contend that an unsuccessful plot to murder his wife constitutes extreme cruelty under New Jersey divorce law and hence "marital fault." Therefore, the husband continues, since such "fault" must be excluded in determining "equitable" distribution, his attempt to murder his wife must be disregarded by a court of equity. To state the proposition reveals its absurdity. As the trial judge declared: "The obligation of this Court is to implement the purpose of law, which is to do justice, and not to mechanically apply established principles of law, even when they compel an absurd result. To ignore the facts of this case would be tantamount to permitting Dr. D'Arc to obtain by indirection that which he failed to obtain by a direct attack on the life of his spouse." 395 A.2d supra, at 1278. This holding of the New Jersey court simply raises no constitutional question.

Third, the husband contends that the admission in evidence of taped recordings of his telephone conversations with Theodore Fino violated a number of statutes, including 18 U.S.C. Sec. 2510 et seq., dealing with wire tap and the interception of telephone communications. First, as the New Jersey Appellate Division pointed out in its brief opinion, there is absolutely no evidence that this tape was obtained by way of an interception or wire tap so as to bring into play the cited statute. Rather, the conversation was recorded by one of the participants, Theodore Fino. Thus the cited statute has no relevance - there was no unlawful interception under the specific language of 18 U.S.C. Sec. 2511 (2)(d).

But the husband further complains that the tape should not be admissible because no proper foundation was laid as to its authenticity or as to its preparation by Theodore Fino. Fino had refused to testify before a Grand Jury in New York investigating this very matter instead choosing to serve a prison term for contempt. Under these circumstances, which the court below found, incidentally, tantamount to Fino's unavailability, the wife offered the testimony of the persons who whom Fino had delivered the tape and described the manner of its recording.

Moreover, the husband's identity on the tape was authenticated by a number of witnesses who recognized his voice as well as by much internal evidence of the identity of the speaker. In any event, the husband has repeatedly argued and argues here that this evidence should not have been admitted on the basis of hearsay statements concerning Fino's recording of the conversations. The New Jersey courts under **New Jersey Evidence Rule 8** held that a trial judge on a preliminary inquiry concerning admissibility may rest his findings upon hearsay relying upon prior New Jersey decisions on the precise point. This concept that hearsay and other "inadmissible" evidence may be admitted to authenticate or to decide preliminary matters is well established. E.g., Federal Rule of Evidence 104(a); McCormick on Evidence 122, n.91 (1972). Moreover, such questions are clearly matters of state law which in no way raise constitutional issues.

CONCLUSION

There are no substantial constitutional or federal questions involved in this matter. The decision rests on sound New Jersey Law. The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

By s/R.H.T.

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Dated: April 7, 1981

Appendix

APPENDIX A

February 22, 1976

We the undersigned Mary Lea Johnson D'Arc and Victor D'Arc agree to separate and live apart from each other.

We agree to release each other from all claims against each other except for the following conditions:

Mary Lea agrees to give Victor D'Arc a sum which after deducting income taxes will give him tax free alimony of $10,000 per month indefinitely. Victor agrees to sign a joint tax return.

Victor will not make Mary Lea responsible for any debts nor will Mary Lea make Victor responsible for any debts.

Mary Lea agrees to make all payments that are necessary on any joint property they have. Mary Lea will continue to live in Victor's apartment at 860 United Nations Plaza as long as she makes the necessary payments for maintenance and other assessments.

Whatever property Victor has in his name will remain in his, and whatever property Mary Lea has in her name will remain in hers, and whatever property they have in their joint names that property will continue to remain that way.

Mary Lea agrees that in the event that Victor should die she will assume responsibility for the welfare of two daughters Karen Helen D'Arc and Pamela Stephanie D'Arc in that she will give them the sum of $25,000 each per year indefinitely. In addition she agrees to pay all of their educational expenses while they are in school.

Mary Lea acknowledges this to be a fair and just arrangement in recognition of the fact that Victor gave up his professional career and earnings to be able to devote himself to her business interests and that he contributed all of his energies to their marriage and family affairs.

If Victor and Mary Lea should become divorced they agree that this agreement shall be part of the divorce decree.

Victor agrees that if in his lifetime he should acquire sufficient capital in his personal estate to produce the same amount of income then Mary Lea will be released from all financial obligations to him.

APPENDIX A

Signed February 22, 1976

s /M.L .J .D

Mary Lea Johnson D'Arc

s/V.D.

Victor D'Arc

DEFENDANT'S
EXHIBIT

D-1 Ev

2-21-78